SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA BARBARA
SANTA MARIA BRANCH; COOK STREET DIVISION
DEPARTMENT SM-2 HON. RODNEY S. MELVILLE, JUDGE

THE PEOPLE OF THE STATE OF)
CALIFORNIA,)
Plaintiff,)
-vs-) No. 1133603
MICHAEL JOE JACKSON,)
Defendant.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, MAY 31, 2005

9:15 A.M.

(PAGES 12485 THROUGH 12503)

REPORTED MICHELE MATTSON McNEIL, RPR, CRR, CSR #3304
BY: Official Court Reporter 12485

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Santa Maria, California
Tuesday, May 31, 2005
9:15 a.m.

(The following proceedings were held in open court outside the presence and hearing of the jury:)

THE COURT: Good morning.
MR. SANGER: Good morning, Your Honor.
MR. SNEDDON: Good morning.
THE COURT: Let's see, I have a question for the District Attorney. I've had a package of your instructions for a while, and then I was given a manila envelope with another set of them. Is that a different set or is that just another copy of the same ones?
MR. SNEDDON: Judge, that is a different set. And the reason is, is that several of the instructions we originally requested have been withdrawn because they're no longer applicable based on certain evidence that came in or didn't come in, and that there are several others that were needed to be added because, again, of the evidence the way it came in in the case.
THE COURT: Well, I guess what I'm going to do is -- you know, I've spent a considerable amount of time analyzing the instructions given to me by 12487

both sides before today. So I'm going to use the set that I've worked with now for quite a while.
MR. SNEDDON: Right.
THE COURT: And to the extent that you want to have me take copies out of the new set, you can do that, but there's no way I could start again this morning to figure out what you're doing.
MR. SNEDDON: Judge, I don't think you're going to find this to be a problem, because I think on your own you will discover that some of the ones that we requested are not applicable. So I don't think this is going to be a big thing.
And I want to let you know that the ones we submitted this morning are ones that have all the "his"es and the "her"s corrected out of it and the applicable language inserted, so we thought that might be helpful to the Court.
THE COURT: That would be helpful.
MR. SNEDDON: So I think you'll find those to comport with what the actual instruction should be so it can be read in an intelligent manner.
THE COURT: Okay. And I did get a few new ones from the defense, their new suggested specials, which I anticipated specials from both sides being submitted.
MR. SANGER: As I understand it, Your Honor, just so we're clear, we don't have any specials from the prosecution. 12488

THE COURT: Other than what they'd already submitted in their original package. Like 222, 222 Penal Code Section, which was the last instruction they added.
MR. SANGER: Okay.
THE COURT: And I think they did during the course of the trial at one point, although I can't remember if -- maybe I did a special myself on the Bashir tape.
MR. SNEDDON: We had requested the Court to take judicial notice of certain things and you said you would defer those until the time of the instructions.
THE COURT: Right. You'll need to bring my attention to those items.
Okay. I have made a list of the instructions, comparing the ones that have been given by both sides, and made some notes on which ones need to be modified, which I think is what you were addressing, Mr. Sneddon, that maybe the modifications have already been given.
So if we start at 1.00, I showed that both of you had requested that. And now I see that on the new one from the D.A., you don't request that; is that correct?
MR. FRANKLIN: No, Your Honor. We do request that the -- apparently the program, the CALJIC program we have, knocked off 1.00 in this 12489

1 list. We have included it as a part of the
2 instructions and it should be given. I don't know
3 why -- I just noticed now that it was not at the top
4 of the list. It should have been.
5 THE COURT: Okay.
6 MR. SANGER: But I would think it should be,
7 yes, Your Honor.
8 THE COURT: I'll give that, then.
9 And then 1.01, I'll give that. Both of you
10 requested that.
11 MR. SANGER: I gather, since we're not
12 hearing anything, that the new packet of the
13 District Attorney from this morning does not have
14 changes to these so far.
15 THE COURT: Right.
16 1.02, and I think this is where you have --
17 there is a -- some selection had to be made at that
18 point, right? That's why the -- I just need to see
19 what it is.
20 MR. SNEDDON: Judge, we just -- since there
21 were stipulations, we removed the brackets on 1.02.
22 I think you'll see that in the one we proposed.
23 Other than that, I don't think there's any changes
24 to 1.02.
25 THE COURT: All right. The brackets are
26 removed as to the party making the objection; is
27 that right?
28 MR. SNEDDON: Your Honor, actually -- 12490

THE COURT: I'm making the stipulation, excuse me.
MR. SNEDDON: Yes, sir. Where it says, "However, if the attorneys have stipulated or agreed," the CALJIC has brackets, and we simply removed that because there were stipulations during the course of this case.
THE COURT: Okay. Do you understand that, Mr. Sanger?
MR. SANGER: Yes. They had -- they left one bracket in their original thing and they've taken it out. So we'll take that. That's fine.
THE COURT: So that's fine. I'll give that. 1.03.
MR. SNEDDON: Again, Your Honor, we removed the brackets because we have had witnesses testify in Spanish.
THE COURT: Okay.
MR. SANGER: And I don't see any brackets in their original version, so I take it it's the same.
THE COURT: That's true. So I'll give that. 1.20. 1.20 is okay. "Willfully defined," I'll give that.
MR. SANGER: Your Honor, you skipped over 1.05. The prosecution withdrew it.
THE COURT: Okay.
MR. SANGER: We did not. You've already given that at the beginning of this case, but it's 12491

such a long case that it might be good to give it again.
THE COURT: We could give 1.05 minus the first two paragraphs.
MR. SANGER: Yes.
THE COURT: Is that your request?
MR. SANGER: That would be my request, Your Honor.
THE COURT: Okay. Modify that.
Jed, for purposes of preparing these, you're going to take notes and send them over to Carrie?
MR. BEEBE: Yeah.
THE COURT: So the first two paragraphs of 1.05 would be deleted.
MR. BEEBE: Okay.
THE COURT: Then 1.06, it looks like that's a correct statement that should be given.
You don't have that in your second group, Mr. Sneddon?
MR. SNEDDON: No.
MR. SANGER: Um --
MR. SNEDDON: It seems to be -- I mean, I'm not making an excuse, but it seems to be covered by other instructions that are going to be given. If the Court recalls, on the conspiracy instruction, you actually even have to read the entire overt acts and indictment again. And with regard to the other offenses, it's -- since there's only one defendant 12492

in this case, it seemed it would be covered, but we have no problem if the Court wants to give it. Seems to me this is more where you have multiple defendants, but there would be no harm in doing it.
THE COURT: I really actually like the idea of, right at the beginning, reminding them of exactly what we're going to be talking about in total, because the rest is all piecemeal.
Is there any objection --
MR. SNEDDON: None.
THE COURT: -- Mr. Sanger?
MR. SANGER: There's no objection to that. I think the bracketed part at the bottom, there are no lessers.
THE COURT: Well, there's a question on that. And the -- do you want to just think for a moment? Is there a lesser-included providing intoxicating liquor to a minor? Isn't that a lesser-included of the administering an intoxicating agent to assist in the commission of a felony?
MR. SANGER: It probably is. We'd have to look at the exact elements, but I believe that it would be. However, we're not requesting the lesser.
THE COURT: Is it something that you have any say about? I mean, isn't it mandatory for the Court to do that?
MR. SANGER: I believe --
THE COURT: It's not something that the

1 defendant can waive, is it?
2 MR. SANGER: I believe the defendant can
3 waive it. But I believe the defendant has to waive
4 it. And -- I could be wrong. But I believe the law
5 right now -- it's changed, as Your Honor knows, over
6 a period of time. I believe that if the prosecution
7 requests the lesser, then -- that may be what the
8 Court is thinking of, that the defense can't waive
9 it. But I'm not conceding that, but just having a
10 discussion about it. I believe that may be true.
11 But I think if both sides waive the lessers, unless
12 the law changed again here, and I'm not positive,
13 but I believe we can waive it, if both sides do.
14 THE COURT: And is that your position, Mr.
15 Franklin?
16 MR. FRANKLIN: I don't have a position on
17 that, Your Honor.
18 THE COURT: They're waiving --
19 MR. SNEDDON: I think the reality is --
20 MR. SANGER: I should have said that. That
21 was a lot simpler, wasn't it?
22 MR. SNEDDON: We'd like to look at that
23 during the break, Your Honor.
24 THE COURT: I think that has to be resolved.
25 There's too many other issues that are tied to that,
26 that we have to resolve that after the first break.
27 I mean, I want to know that because we'll have to
28 change this instruction. We'll have to change other 12494

instructions. This isn't something that we can decide at the end of the day. It's something we have to decide at the beginning.
MR. SANGER: Just one second. There is a section in CALJIC itself that deals with lessers. It's Appendix C, as the Court knows, and it may answer the question right now as to the current state of the law.
MR. SNEDDON: Which one?
I'm sorry, Your Honor, I didn't hear which one he said. C or --
THE COURT: C.
MR. SANGER: It does appear that the Breeverman case, 1998 case --
THE COURT: They can't hear you.
MR. SANGER: The Breeverman case, 1998 case, from this, looks like it may be controlling. It looks like the Court would have to make a determination as to whether the evidence supports the giving of a lesser.
THE COURT: And I have looked at all of the charges. And this is the one charge that seemed, to me, that the evidence does support the giving of that lesser.
MR. SNEDDON: It does.
THE COURT: Which would then make it sua sponte required instruction, and I don't see anything in there that allows a waiver. 12495

MR. SANGER: Yeah, just reading the discussion and refreshing my recollection such as it is on this, it seemed to me that we had an argument at one point that if both sides agree, and there's a stipulation and a waiver on the record by the defendant personally, that the Court does not have to give it where there's -- but, if -- because the language was notwithstanding the waiver by one side or the other. There was some -- there was some language in the case that left the door open, not to mention doors being opened to interpretation, that if both sides actually agree and the defendant waives it on the record.

But I'll submit it, unless the Court wants to take the next break, and we can take a look at the case itself.

THE COURT: What's your -- Mr. Sneddon, what's your position? Mr. Franklin doesn't have one, so I'll ask you what yours is.

MR. SNEDDON: Well, I'm --

THE COURT: You still want to wait a few minutes?

MR. SNEDDON: No. I'm convinced that the Court needs to give it.

THE COURT: That's what I thought. Okay. So then that language at the bottom of 1.06 would be necessary.

MR. SANGER: And just for the record, 12496

although I would suspect if the prosecution is not joining, our position is fairly weak on this, but for the record, we would object to the giving of an instruction on the lesser.
THE COURT: Okay. Now, one of the questions I have, which I think has to be decided, again we have to discuss it early on, because it will come up in other instructions, is in Count 6, the crime alleged is an attempt to commit a lewd act upon a child.
May I ask what -- what acts you're relying on for that?
(Off-the-record discussion between the Court and Court Research Attorney Jed Beebe.)
MR. SNEDDON: Does the Court want me to respond to that, Your Honor?
THE COURT: Yeah, just a second. If you'll wait just a second.
Okay. Yes.
MR. SNEDDON: Specifically, the testimony from Gavin Arvizo that the defendant reached over and grabbed his hand and moved his hand towards Mr. Jackson's crotch area, and that the boy then took his hand away and said he didn't want to do that. I also believe that there's some testimony that at that point Jackson said something to the effect that it was natural and okay, but the boy didn't want to do it. 12497

THE COURT: All right. Thank you.
Additionally in 1.06, I think we should add the language, “In Count 1, the crime alleged is conspiracy.” And then say, instead of moving right to the date, “to commit the crimes of extortion, false imprisonment or child abduction,” to make the statement to the jury clear at this point.
And then I’d like to add at the end of the instruction, after the last paragraph, “In Counts 7 to 10, namely, administering an intoxicating agent to assist in the commission of a felony, the lesser crime is furnishing alcohol to a minor.”
MR. SNEDDON: Your Honor, is the Court -- does the Court have in mind the “furnishing” aspect being the violation of 272, contributing, or the specific B&P Code Section --
THE COURT: The specific B&P Code Section.
MR. SNEDDON: Okay. I just wanted to know. Thank you.
THE COURT: And that would be 16.010, we would modify later to -- when we get to the specific offenses, to have that -- use paragraph two of that, furnishing liquor to a person under 21. The second paragraph, “Every person who unlawfully sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage to any person under the age of 21 is guilty of a violation of Business & Professions Code Section 25658, 12498

1 Subdivision (a), a misdemeanor."
2 And then it goes on, "In order to prove this
3 crime, each of the following elements must be
4 proved: One, the defendant, Michael Jackson,
5 furnished, gave or cause to be furnished or given
6 away an alcoholic beverage to Gavin Arvizo; and two,
7 Gavin Arvizo was under the age of 21. "
8 MR. SANGER: At the end of 1.06, Your Honor?
9 THE COURT: No, I'm going to put that at
10 1.06.
11 MR. SANGER: Oh.
12 THE COURT: I'm going to put it back where we
13 have a discussion of the crimes.
14 MR. SANGER: I agree with that. That's not
15 what I meant, I'm sorry. I was referring the
16 Court's attention to the end of 1.06. It says --
17 you indicated "the lesser crime is furnishing
18 alcohol to a minor," and I think that should say "a
19 misdemeanor." Is that correct?
20 THE COURT: It should. You can say that if
21 you want.
22 MR. SANGER: Well, it says that --
23 THE COURT: We will say that.
24 MR. SANGER: It says "a felony" elsewhere,
25 so I think we should say that.
26 THE COURT: Yes, I think you're right. Okay.
27 MR. SANGER: I think 1.12 was requested by
28 both sides and was withdrawn by both sides. If it 12499

wasn’t by us, it is now.
MR. SNEDDON: One point what?
MR. FRANKLIN: 12.
MR. SANGER: 1.12.
MR. SNEDDON: Oh, yeah.
THE COURT: Yes.
MR. SANGER: Now, in that regard, if the Court is going to read the indictment at some point --
THE COURT: I don’t think I need to read the indictment.
MR. SANGER: I don’t think you do. I heard Mr. Sneddon say that.
MR. SNEDDON: No, I didn’t say that. I said that there’s a CALJIC instruction which requires you to read the conspiracy charges and the overt acts in the 1600 series.
THE COURT: Which you’ve already prepared.
MR. SNEDDON: I have.
THE COURT: And the only problem with it, in the old package - I haven’t seen the new package - was that the Doe names were used.
MR. FRANKLIN: The new package does, too.
THE COURT: So we want that instruction with the names in it.
MR. SNEDDON: We can modify that.
THE COURT: We’ve used their names throughout the trial.
MR. SNEDDON: We’ll modify that for the 12500

Court.
THE COURT: Yes. But will you modify it quickly?
MR. SNEDDON: Well, how quickly would you like it? By noon?
THE COURT: Yes.
MR. SNEDDON: You'll have it.
THE COURT: Thanks.
The reason I want to do this is -- I don't know if I told you this or not, so I'll tell you, I intend to give each of the 20 jurors a full package of the instructions to read as I read them to them. So I will have those prepared. So I have to have a full package today so that I can have those prepared. You know, usually we have overnight to clean up any things like this. But we don't in this case.
MR. SNEDDON: Are they going to be allowed to take their packet in with them to deliberate?
THE COURT: Yes.
MR. SNEDDON: Okay.
THE COURT: That's the purpose of giving it to them.
MR. SNEDDON: That's fine.
MR. SANGER: All right. If we're keeping track, that was my concern, that the name -- we don't have "Does" showing up in the instructions anyplace. 12501

THE COURT: That's my intent here.
MR. SANGER: With that, we withdraw the 1.12.
THE COURT: Okay. 1.12 has been withdrawn by both sides.
You know, it's break time. And we have people in the audience that have been sitting even though we've been not sitting here. So I will take the break. That will give you a chance to catch up, Counsel, on those items.
(Recess taken.)
--o0o--

REPORTER'S CERTIFICATE

THE PEOPLE OF THE STATE)
OF CALIFORNIA,)
Plaintiff,)
-vs-) No. 1133603
MICHAEL JOE JACKSON,)
Defendant.)

I, MICHELE MATTSON McNEIL, RPR, CRR, CSR #3304, Official Court Reporter, do hereby certify:

That the foregoing pages 12487 through 12502 contain a true and correct transcript of the proceedings had in the within and above-entitled matter as by me taken down in shorthand writing at said proceedings on May 31, 2005, and thereafter reduced to typewriting by computer-aided transcription under my direction.

DATED: Santa Maria, California, May 31, 2005.

MICHELE MATTSON McNEIL, RPR, CRR, CSR #3304

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA BARBARA
SANTA MARIA BRANCH; COOK STREET DIVISION
DEPARTMENT SM-2 HON. RODNEY S. MELVILLE, JUDGE

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TUESDAY, MAY 31, 2005

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(PAGES 12504 THROUGH 12608)

REPORTED MICHELE MATTSON McNEIL, RPR, CRR, CSR #3304
BY: Official Court Reporter 12504

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MR. SANGER: I guess we're ready to begin,
but we're not going to have the benefit of Mr.
Franklin's opinion. A little humor, sorry.
THE COURT: I appreciated it.
It didn't call for a belly laugh.
MR. SANGER: No, no, it wasn't a real
knee-slapper, but I appreciate the smile.
THE COURT: 1.21.
MR. SANGER: I think you passed 1.20 without
saying you're giving it, but I believe it should be
given.
THE COURT: Well, let's see. You're right.
1.20, "willfully," I had marked that off as giving
it.
1.21 I will give. That's "knowingly."
And 1.22.
MR. SANGER: That's "malice." And "malice"
is used in false imprisonment, which is CALJIC 9.72.
MR. BEEBE: That's child abduction.
MR. SANGER: I'm sorry, child abduction.
MR. SNEDDON: Your Honor, it's defined in
9.72 in the sections under child abduction.
"Maliciously" is defined in that instruction.
THE COURT: So we don't need --
MR. SNEDDON: So we don't need the -- this
would be a repetition.
THE COURT: Okay.
MR. SANGER: If it's not on -- if it's not 12506

used in any other instruction - and I couldn't find it going through here quickly - then we'll submit it.
THE COURT: All right. So I'm not going to give 1.22, because it is in another instruction.
1.23, "Consent," I'll give that one.
1.25. That defines a minor.
MR. SNEDDON: I think we asked that, and we withdrew that. That's one of the ones we withdrew because the age limitation is actually 14 in this case.
MR. SANGER: Well, the age limitation for alcohol is 21, so you've got three different ages.
THE COURT: Yeah, for the lesser-included.
MR. SNEDDON: Well, that's defined, though. In the B&P it says "21."
THE COURT: Under that code section?
MR. SNEDDON: I believe it does.
THE COURT: Let me see.
MR. SANGER: It was 16.010.
MR. SNEDDON: Yes, it does say "21."
THE COURT: Yeah, I think that's sufficient, don't you?
The "furnishing," do you have that in front of you, Mr. Sanger?
MR. SANGER: Yeah. 16.010, there's no question that's covered. I'm just thinking is there any other place where "minor" is used in this case, 12507

and I don't think there is, because I think the other is under the age of 14. So we would agree to withdraw it based on that.
THE COURT: Okay. The next one is "Direct and circumstantial evidence," 2.00. I'll give that. The next one is 2.01, "Sufficiency of circumstantial evidence," I'll give that. The next one is "Sufficiency of circumstantial evidence to prove specific intent or mental state," I'll give that.
MR. SNEDDON: I believe, Your Honor, in the ones that we submitted, that the bracketed information is filled in and/or brackets taken off where appropriate. I just wanted to direct the Court's attention to that.
THE COURT: Okay. Thank you.
MR. SANGER: I think that's the same. I think that was done in the original one.
THE COURT: Yes, I think so. But that's good then.
MR. SANGER: Wait a second. There is another change here. It's modified. Can we have just one second, please?
THE COURT: Yes.
MR. SNEDDON: I can just indicate to the Court, with regard to the originals that we submitted, those were done by Mr. Nicola, but the ones that we submitted this morning were done by Mr. 12508

Franklin and I over the weekend, so I have a great deal more confidence in the fact we -- they may be the same in some cases, but I --

THE COURT: Looks okay.

MR. SNEDDON: Yeah.

THE COURT: But you're looking at something that I don't see, Mr. --

MR. SANGER: There is a difference, and it may not be a big difference, but it always worries me when there's a modification and there's no indication it's modified.

The original one just says --

MR. SNEDDON: Which one are we dealing with, Counsel?

MR. SANGER: 2.20, the first one says, "You may not find the defendant guilty of the crimes charged unless the proved circumstances are not only...," and then it says, in the second version, "...guilty of any of the crimes charged in the indictment unless the proved circumstances...," which just causes me to wonder why we have different language. And I don't think it's necessary to say "indictment." "Crimes charged" is adequate. An indictment is not evidence of a crime.

MR. SNEDDON: That's fine. Whatever. It doesn't make any difference.

THE COURT: So we'll take out "in the indictment" and just leave "charged crimes." 12509

MR. SANGER: If you have your original one,
I think that's --
THE COURT: We can use that one.
MR. SANGER: You can use that one.
THE COURT: No change is necessary, Tracy,
because we're using --
MR. SNEDDON: 2.02 has that language there
for the lesser-included, but I believe the
lesser-includeds in this case are general intent
crimes, or a general intent crime.
THE COURT: It is a general intent crime.
MR. SNEDDON: So I just wanted to bring that
to the Court's attention.
THE COURT: Okay. All right. 2.03 is
"Consciousness of guilt, falsehood."
MR. SANGER: We originally requested that at
the beginning of the trial.
THE COURT: It is requested by both sides.
MR. SANGER: But I would withdraw our
request and object to it.
THE COURT: Okay. What evidence are you
relying on?
MR. SNEDDON: Your Honor, I'm specifically
relying on that portion of the Bashir video in which
the defendant was confronted with the statement
about a 40-year-old man sleeping with children, and
said it's not sexual, it's not sexual, and then went
on to portray the incidences being those of where 12510

they eat cookies and drink milk, and things like that. And I think that those are fabrications, which I think, if the jury finds those to be not true statements, can be used to reflect his consciousness of guilt.
MR. SANGER: The only problem is that the crimes charged in this case are alleged to have occurred after that video. That video was done in 2002, the fall of 2002, and the crimes alleged here are alleged to have occurred in February and March of 2003. So it could not be a false statement regarding the crimes for which he is now being tried, which is the language of this --
MR. SNEDDON: I don't think there's any requirement that it be during the time frame of the charges. It can be a statement that's made before that reflects on the charges that are currently pending.
THE COURT: It says, actually, "...deliberately misleading statement concerning the charge for which he is now being tried." So he can't be making a misleading statement about a crime he hasn't committed; I mean, hold him to that, it doesn't seem to me. I think Mr. Sanger is right. Is there any other evidence that you can think of that you --
MR. SNEDDON: No, that's what we had in mind. 12511

THE COURT: All right. I'll reject that, as requested by the defense. It's rejected.
MR. SANGER: And for some reason, 2.04 was in our packet early on. And we'd withdraw the request for that and also object to it.
MR. SNEDDON: It can be withdrawn, Your Honor, 2.04.
THE COURT: 2.04 is withdrawn.
2.05.
MR. SANGER: The same with 2.05.
MR. SNEDDON: Same.
THE COURT: 2.05 is withdrawn.
MR. SANGER: And 2.06.
THE COURT: 2.06 -- let's see, 2.05 -- 2.04, that was withdrawn, is, "Efforts by a defendant to fabricate evidence." And 2.05 is, "Efforts other than by defendant to fabricate evidence." And those have both been withdrawn.
2.06, "Efforts to suppress evidence."
MR. SANGER: I think I said this, but we also withdraw our original request and object.
THE COURT: Do you have any evidence you're relying on for that, Mr. Sneddon?
MR. SNEDDON: No, you can withdraw that, Your Honor.
THE COURT: Okay. 2.06 is withdrawn.
2.09, "Evidence limited as to purpose," that should be given. I'll give that. 12512

MR. SANGER: We obviously have specials that I take it the Court will come to at the end.
THE COURT: Yes. I was just thinking, should there be something in 2.09 that says, “You will be instructed further on that”?
MR. SANGER: Well, I was thinking the special --
THE COURT: On one part we did not instruct them at the time, the takeouts. I am going to give a limiting instruction on that, but they didn’t receive it at the time.
MR. SANGER: Oh, I see. You’re saying take the words out “at the time”?
THE COURT: Yeah.
MR. SANGER: Well, I would suggest you leave that in, and then follow this with the special instructions regarding the various items. I don’t know whether the Court will entertain all of our requests, but following the various -- I’m sorry, following this with the specials relating to the various specific items. And when you introduce the outtake evidence, you can say at the time we did not give a particular limiting instruction; however, this is also subject.... So I think you should alert them.
THE COURT: I think you’re right. Because there was -- all right. That’s fine. And you’re suggesting that we put the 12513

limiting instructions right after this instruction.
MR. SANGER: Yes, sir.
THE COURT: Well, I'll tell you, I'm willing to do that as a placement, but I think I would like to put off the discussion of those until later, because it's going to be a little more intense discussion, but --
MR. SANGER: We'll try not to disappoint you at the given time.
MR. SNEDDON: Judge, can I point out that there is still some other limiting instructions that you give that are involving 1101 evidence that probably -- that there are specific instructions on, so you won't be able to line up all of those limiting instructions under this one.
THE COURT: Yeah, that's why I want to look at the whole --
MR. SNEDDON: Package before we get there.
THE COURT: Yeah. To where it all fits best. I mean, I kind of like the idea of following the general, but we'll see how it fits.
MR. SNEDDON: All right.
THE COURT: This is that change, Mr. Franklin, in the overt instruction?
MR. FRANKLIN: Yes, Your Honor.
THE COURT: Thank you.
MR. FRANKLIN: The wonders of global search made it faster. 12514

THE COURT: Thank you.
Mr. Sanger made a joke about you in your absence, but I'm not going to take the time to explain it to you.
MR. FRANKLIN: I'll sweat it out of him outside.
THE COURT: Yes.
MR. FRANKLIN: Thank you, Your Honor.
THE COURT: 2.11, "Production of all available evidence not required," I'll give that.
2.11.5, I'll give that. That's "Unjoined perpetrators of the same crime."
MR. SANGER: Yeah, just for the -- Your Honor already ruled, so I'm not arguing, but just -- we would intend to withdraw our request for that and object to it.
THE COURT: All right.
2.13, "Prior consistent or inconsistent statements as evidence," I'll give that.
2.20, "The believability of witnesses." It looks like you have removed the "conviction of a felony." We don't have any convictions of a felony, do we?
MR. SNEDDON: No. No.
THE COURT: And did you take anything else out? "Character evidence"? That's out, right?
MR. SNEDDON: Correct. I believe we took out the -- 12515

THE COURT: Yes, you did. I'm just checking the other one prior. Okay.
MR. SANGER: Well, but they also took out "past criminal conduct of a witness amounting to a misdemeanor" and "whether the witness is testifying under a grant of immunity."
MR. SNEDDON: Right.
THE COURT: I think both of those should be in.
MR. SNEDDON: Which is that, Your Honor?
THE COURT: "Past criminal conduct of a witness amounting to a misdemeanor" and "whether the witness is testifying under a grant of immunity."
MR. SNEDDON: What misdemeanor is that?
THE COURT: Possibly welfare fraud.
MR. SANGER: Actually, the law's a bit of an anomaly, because it says "prior conviction of a felony," and then you don't have to have -- or you can't just use a conviction of a misdemeanor.
THE COURT: You have to have the facts.
MR. SANGER: You have to have the facts. However, if you have the facts of a felony, that also would count, where you don't have a conviction for a felony, but you have the facts. So it really should say, "past criminal conduct of a witness," period.
We don't have convictions of a felony, but we have criminal conduct that amounts to a felony. 12516

And possibly to both. Possibly a felony and a misdemeanor.
THE COURT: I'm not sure that's correct. The rule for impeachment with misdemeanors is that you have to impeach by the actual conduct. And with a felony you may impeach by a conviction.
MR. SANGER: I agree with that, but the obverse of that is not necessarily true. In other words, the fact that you don't have a conviction for a felony does not preclude you from showing felony conduct to show moral turpitude and lack of truthfulness.
So the fact that perjury, for instance, is a straight felony, it's not a wobbler, you could only introduce -- if the other were -- the opposite were true, you could only introduce evidence of a conviction for perjury, but you couldn't introduce evidence of underlying conduct, where you could introduce evidence of welfare fraud because that could be either a misdemeanor or a felony, so it wouldn't make any sense.
I mean, in other words, I think the rule is that if it's a felony, a conviction is sufficient. If it's a misdemeanor, a conviction is not sufficient. You have to show the conduct. But that doesn't mean that you can't show the conduct of a felony. The instruction is worded that way simply because that's usually the case, I think, that you 12517

have --
THE COURT: I'm going to use the instruction as worded and add "the past criminal conduct of a witness amounting to a misdemeanor" and the "whether the witness testifying is under a grant of immunity."
Do you have that, Tracy?
And 2.21.1, "Discrepancies in testimony," I'll give that.
2.21.2, I'll give that. That's "A witness willfully false in their testimony."
2.22, "Weighing conflicting testimony," I'll give that.
2.23, "Believability of a witness, conviction of a felony," that's withdrawn.
MR. SNEDDON: I don't think we have any evidence of that.
THE COURT: Is either side requesting that?
MR. SANGER: I don't believe there's any evidence of that, actual conviction of a felony.
THE COURT: 2.23.1, "Believability of a witness, commission of a misdemeanor."
The question there would be whose name goes in there, or names? "Evidence has been introduced for the purpose of showing that a witness...."
Do you want to leave the names out and just argue it?
MR. SNEDDON: That's what I think ought to 12518

be done.
MR. SANGER: Well, there's Janet Arvizo and Rudy Provencio.
MR. SNEDDON: Rudy Provencio?
MR. SANGER: Manufacturing evidence, false evidence.
THE COURT: What --
MR. SANGER: And I'm still troubled by this felony, that you can --
THE COURT: Well, let's just move on. Be troubled elsewhere.
MR. SANGER: It has to do with this instruction, though, that's -- and the prior instruction as well.
THE COURT: Let's just deal with the question at hand, please.
MR. SNEDDON: I think it should be left blank and argued.
MR. SANGER: I suppose, because there's more than those two witnesses that could arguably fall into that category. Cindy Montgomery and -- so I'll submit it.
THE COURT: It seems better to do it that way, I think, and leave each side to whatever crimes they think have been shown.
Is there any -- on this issue that you're worrying about, Mr. Sanger, is there anything in the supplements? I mean, these are instructions that 12519

have been used for years.
Is there anything in the supplements that shows that the language of the CALJIC official instructions shouldn't be followed? I'll come back to it if you want.
MR. SANGER: Yes, if I could. We'll try to --
THE COURT: Some authority would help.
MR. SANGER: -- at a break, see if we can. I was just looking at the use note to see if -- it doesn't say to the contrary either, which surprises me, if there's a rule to the contrary. It doesn't say only a felony conviction may be used. It talks about the fact that there's -- a conviction is adequate proof, and that shows there's moral turpitude, and that's the basis for impeachment. So we'll see if we can take a look on the break at that.
THE COURT: Yeah, I thought that to some extent. Well, do you think we should change 2.23.1 to say, "Evidence has been introduced for the purpose of showing that a witness" -- "or to show" -- "Evidence has been introduced for the purpose of showing witnesses have engaged in past criminal conduct"?
MR. SANGER: Period. That would be my request.
THE COURT: It's changing it, though, from "a" to "witnesses." 12520

MR. SANGER: Yes.
THE COURT: Is that okay?
MR. SANGER: That would be correct, yes.
MR. SNEDDON: Well, I would prefer that you put "witness" and then bracket, "e-s," paren, so that the Court doesn't appear to be editorializing that there really are, because this is a jury decision.
By putting more in, it's an indication that there is some lack of discretion in this area, and, quite frankly, it is up to the jury to make that decision. Or to put "witness or witnesses."
But I think to say "witnesses" tends to imply that there has been some misconduct done, and I don't think that's really -- I think that infringes upon the jury's fact-finding process.
MR. SANGER: There's definitely more than one witness. I mean, I said Rudy Provencio and I got an argument on that, but --
THE COURT: The rest of the instruction talks about a witness.
MR. SNEDDON: It would have to be modified throughout, I think.
MR. FRANKLIN: "The" to "a."
THE COURT: Do you have an opinion on this, Mr. Franklin?
MR. FRANKLIN: Change "the" to "a" where it appears. The third sentence, "The fact that a 12521

witness engaged in....” Other than that, with
respect to policy decisions, I defer to my senior
lead counsel.
THE COURT: I’m not sure where you’re saying
change “the” to “a.”
MR. FRANKLIN: The second sentence
commences, “The fact that the witness engaged in” --
THE COURT: Oh.
MR. FRANKLIN: -- I’d suggest we change
“the” to “a” to keep it sort of noncommittal. And I
think there’s merit to the notion of “witness or
witnesses.”
THE COURT: “Witness or witnesses.”
Is that okay, Mr. Sanger?
MR. SANGER: Yes, Your Honor.
THE COURT: Then I think I’ll just leave
“the” alone.
MR. FRANKLIN: Your Honor, are we going to
leave in “amounting to a misdemeanor” or strike
that?
MR. SNEDDON: No, that stays in.
THE COURT: Right now it’s staying in.
MR. FRANKLIN: Very well.
THE COURT: And I’m allowing Mr. Sanger to
show me a reason to go along with his approach,
which would be just to put in “a crime” as opposed
to “a misdemeanor.” What’s your position on that?
MR. FRANKLIN: If we -- I think if you 12522

either specify -- if you specify a misdemeanor, then you have to define what crimes are misdemeanors. The jury won't know. So there may be some merit to leaving out either specification of a misdemeanor or felony and leave it just "crimes." Although it could be argued, of course, by either side as to what crime is a misdemeanor.
THE COURT: So neither side is advocating that we just follow the "misdemeanor" language then; is that correct?
MR. SANGER: That's correct.
THE COURT: In that case, we'll follow the "crime" language. "Has engaged in criminal conduct," that's where that would stop, right? On 2.23.1?
MR. SANGER: Yes. And then, depending on which version you have, three or four lines down says "amounting to a misdemeanor" should be left out.
THE COURT: Yeah, we cross out "amounting to a misdemeanor," and then again that repeats itself. And then the heading on this instruction should be changed to "Commission of a crime," right?
MR. SANGER: Yes.
Would it be appropriate to then revisit 2.20 and take "amounting to a misdemeanor" out of that?
THE COURT: Yes. Okay. And that's where it would say, "Past criminal conduct by a witness 12523

amounting to" -- that's all. Just "past criminal conduct of a witness," huh?
MR. SANGER: Yes. Period.
THE COURT: Period. Okay.
Okay. 2.24, "Believability of a witness."
What character testimony has been introduced?
MR. SANGER: I don't think there is, and we would withdraw the request and object to it.
MR. SNEDDON: That's fine.
THE COURT: Okay. It's withdrawn by both sides, 2.24.
2.25: "Refusal of witness to testify," when a witness refuses to testify to any matter based on the privilege against self-incrimination.
MR. SANGER: We've submitted a special instruction that tries to grapple with the situation I think we're in here. I don't think 2.25 adequately addresses it. And I know the Court ruled otherwise previously and gave an instruction, but the more I've thought about it, the more it seemed that we have the right-of-confrontation issue when it's a prosecution witness and that that should be acknowledged.
So I wonder if the Court would want to hold this, tab it or something, until we get to the specials.
THE COURT: Okay. 12524

MR. SANGER: And, actually, the same would go for 2.26. Just hold that, too, because I think there's a special that tries to grapple with all of those.
THE COURT: Neither of those were in the original packages, so I'll hold ruling on 2.25 and 2.26 until we look at the specials at the same time.
2.27, I'll give that. That's "the sufficiency of the testimony of one witness."
2.40, "Traits of character of defendant."
MR. SANGER: Excuse me one second.
Well, there was a 2.29, but I take it that was withdrawn. That was a witness in custody, so -- I'm sorry.
THE COURT: I don't have that.
MR. SANGER: I had a note that the prosecution asked for it. It doesn't matter. If the Court doesn't have it, we don't want it, nobody wants it.
THE COURT: Okay. 2.40. I don't think that the --
MR. SNEDDON: Your Honor, are we on 2.29?
THE COURT: Well, yes.
MR. SNEDDON: Yeah, I think in light of the Court's ruling that we couldn't ask any have-you-heard questions, that this instruction should not be given.
MR. SANGER: 2.29? 12525

THE COURT: 2.40.
MR. SNEDDON: Yes, I'm sorry. And we're on 2.29 now?
THE COURT: There is no 2.29. I don't have one.
MR. SNEDDON: That's a mistake.
THE COURT: Okay. 2.40, which is "The traits of character of defendant," so you're right. You're not asking for this. Nobody's asking for 2.40 at this point.
MR. SNEDDON: All right.
MR. SANGER: I think we asked for it, but I -- I think the Court ruled that there was -- that there was not character evidence during the course of the trial.
THE COURT: Yes. Which is exactly what you wanted me to rule.
MR. SANGER: Right. Except for the 1108, which was not character, but it was --
THE COURT: Right.
MR. SANGER: So I think in light of that, we'd have to withdraw it.
THE COURT: Okay. Both sides withdraw 2.40.
MR. SANGER: And 4. -- 2.42 would go as well.
THE COURT: Yes. That's "Cross-examination of a character witness," so that's gone also. Do you agree, Mr. Sneddon? 12526

MR. SNEDDON: Yes, that would have been one of the ones we would have withdrawn, Your Honor.
THE COURT: Okay. 2.50, “Evidence of other crimes.”
MR. SANGER: We have two versions from the prosecution. We got the earlier one, and the more recent one, which is the one we have this morning, I haven’t had a chance to compare it and see which brackets were eliminated.
MR. FRANKLIN: We’ll eliminate the “he/she” on line 5.
MR. SANGER: Well, that would be a good point right there.
THE COURT: This is evidence that the defendant committed other crimes.
MR. SNEDDON: Right.
THE COURT: So you’re going to submit a new one with “he” in it?
MR. FRANKLIN: Yes.
MR. SNEDDON: Just going to take out the word “she.”
MR. SANGER: It’s -- doing this on the fly, it’s a little hard to tell which brackets have been taken out here, so --
THE COURT: I know.
MR. SANGER: I see in the new one there’s -- inexplicably the word “certain” shows up at the beginning of the instruction. I suppose it doesn’t 12527

hurt anything, but that causes me to have concern about the rest of the instruction. I have some observations, if the Court is ready.
THE COURT: Yes. Just a moment.
Did you want to say something?
(Off-the-record discussion between the Court and Court Research Attorney Jed Beebe.)
MR. FRANKLIN: Which one, Bob?
MR. SANGER: We're on 2.50. At least I am. I think the Court is.
THE COURT: Yes.
MR. SANGER: I have objections to the new version, and I think the new version eliminated some of what was in the old version that clearly does not apply, so I think we could work with the new version, if that's all right with the Court.
THE COURT: Okay.
MR. SANGER: We're already eliminating the word "she" up there in the second paragraph. I don't know why the word "certain" is there. I don't know why that really matters, but that's not part of the instruction at the very beginning.
THE COURT: Okay. We'll take out "certain."
MR. SANGER: Now, I have really two objections to this. After the words "Counts 2 through 10," the bracketed material, "or a clear connection between the other offenses and the one of 12528

which the defendant is accused so that it may be inferred that if defendant committed the other offenses, defendant also committed the crimes charged in this case," which is 1101(b), this is an 1101(b) instruction, and under the facts of this case, that sounds like propensity, which is not what 1101(b) was designed to do. And I take it there's an 1108 as a separate instruction.

The other thing, and I'll just defer to counsel to comment on whatever, but just let me indicate there's -- this instruction apparently is related to the alleged sex offenses. It's not related to the conspiracy. There is no conspiracy with regard to Counts 2 through 10. So the two paragraphs at the bottom of page one that pertain to part of a larger continuing plan, scheme or conspiracy, and existence of conspiracy, that should be eliminated. That would not apply to the 1101(b) evidence.

MR. SNEDDON: I disagree with both those comments. But, first of all, the comment above is the direct language taken from the 2.50, which was bracketed, and it does refer to the inferences which the jury is allowed to draw with regard to this type of evidence.

And secondly, there are -- there is evidence before the Court, before the jury, that involves 1108 type of conduct on the issue of the conspiracy. 12529

So it seems to me that this instruction applies not only to the events and testimony directed at the 1101, but also directed to the conspiracy.
MR. SANGER: May I just have a moment, Your Honor, please?
MR. SNEDDON: Judge, just to make it clear with regard to the 1101(b) on the sexual part, this is a situation where the jury is allowed to draw inferences from the conduct involved in that evidence for certain limited purposes under 1101, and then those same acts of conduct are allowed to be expanded on in 1108.
But that's not to mean that the inferences that are traditional 1101 types of things for modus operandi, scheme, motive and intent are not -- that those other offenses, just because they're allowed on the grounds of 1108, are not useful under 1101 for the purposes that 1101 authorizes. I think that's why that language should be kept in.
THE COURT: But I thought the 1101 evidence was limited to the method, the characteristic method. Isn't that why we introduced that?
MR. SNEDDON: No, I think in our moving papers we actually delineated five separate reasons why it was admissible under 1108 -- 1101. And each one of these are reasons that we set forth, along with the factual recitation as to why they would be 12530

admissible under the traditional 1101 approach.
MR. SANGER: Well, the way I see it, there's a separate instruction and then we requested a special on 1108. And I understand this is a 2005 revision, and that doesn't mean that the jury -- that the commission that proposes these instructions got it right.
In 2.50, they basically talk about common plan or scheme, intent, motive, knowledge, and those are the issues for 1101(b). And that's what 2.50 should address. They throw in a sentence at the end of the third full paragraph there, or a portion of the sentence, right after the word "10." It says, "or a clear connection between the offenses so that it may be inferred that if a defendant committed the other offenses, the defendant also committed the crimes charged in this case."
That's clearly 1108. That's clearly not 1101. There's no reason to put 1108 language in the 1101(b) instruction. So I think that should be -- that should be taken out.
And the use note also says if you have 1108, you should be using 2.50.01. And once again, the conspiracy is -- the existence of a conspiracy has nothing to do with this prior sexual acts, so that should go out.
And I think, if you take that last sentence out after the Counts 2 through 10, starting with -- 12531

or the portion of the sentence starting with “or a clear connection” to the end of the paragraph, if you take that out, then it stands on its own as an 1101(b) instruction. And then you go to 2.50.01, and that covers the 1108. So to the extent it’s not coterminous, I think some of the evidence was 1101(b) and some of it was 1108.

MR. SNEDDON: Judge, I think that counsel’s making two mistakes. One, I think that the 12 -- the revisions to 2.50 are the insertion of the gang enhancement ones, which were previously not in there. I don’t think it changes the basic language of the instruction 2.50.

And I think what counsel’s preoccupied with is the fact that 1101(b) does not have to be used only in sexual assault cases. It can be used in burglaries. It can be used in robberies. It can be used in murders. It can be used in virtually any type of a crime.

And in this particular case, I think we have evidence that not only relates to issues involved in the molestation of Gavin Arvizo, but also to the conspiracy. And particularly motive evidence. And some of the other acts are acts that are alleged in the overt acts from which the jury is entitled to draw inferences.

MR. SANGER: Well, now, if Mr. Sneddon is now saying that 2.50 is just a straight 1101(b) 12532

instruction, then that's all the more reason that you would have to take out that 1108 language, because if he's claiming that it pertains to all of the counts, then it should just be a generic 1101(b) instruction.
MR. SNEDDON: No, that's --
THE COURT: This is how I'm going to give the instruction, then. Do you want to --
MR. SANGER: Yeah.
THE COURT: -- get your materials?
"Evidence" -- I'm not going to use the word "certain."
"Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial."
So that sentence has one change, right?
And then the next one, "Except as you will otherwise be instructed, this evidence, if believed, may be considered by you only for the limited purpose of determining if it tends to show," colon, "A," the next paragraph, "A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged."
Then the rest of that paragraph goes out.
Next paragraph: "The existence of the 12533

intent which is a necessary element of the crime charged."
The next paragraph I will use would be, "A motive for the commission of the crime charged."
And the next paragraph I would use would be, "For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case."
Okay. 2.50.1 -- 2.50.01, "Evidence of other sexual offenses, Evidence Code 1108."
Is there any reason -- going back to 2.50 for a minute, is there any reason that the heading on that shouldn't at least cite Penal Code Section 1101?
MR. SANGER: Evidence Code Section 1101?
THE COURT: Excuse me. Yeah.
MR. SANGER: That would make sense.
THE COURT: So would you add that, Tracy?
Evidence Code -- just like the next -- the way I picked that up is the next one, 2.50.01, cites Evidence Code 1108. And I think -- the reason I think that's important is that, to some extent, my instructions to the jurors might have used the numbers "1101" and "1108." I can't remember. To the extent that it does, that would be clarifying help, right?
MR. SANGER: I don't think it hurts.
THE COURT: Excuse me? 12534

MR. SANGER: I say, I don't think it hurts.
THE COURT: Okay.
MR. SANGER: I do have a question about the interrelation between 2.50 and 2.50.01.
THE COURT: Yes.
MR. SANGER: Your Honor excluded the portion -- the traditional portion of 1101(b), which is that the evidence cannot be considered to prove that a defendant is a person of bad character or that he has a disposition to commit crimes.
Now, I understand that the reason the Court did that, I suppose, is that 2.50.01 is going to, you know, say, "But you can consider the disposition to commit crimes"; however, there is 1101(b) evidence that wasn't 1108, so you're not making that distinction. And in case we have anybody who's got an advanced degree in philosophy, they might pick up on that at some point in the instruction.
Would it be possible to say at the end, "You're not permitted to consider such evidence for any other purpose, and except for the evidence referred to in the next instruction, you may not consider this evidence to prove the defendant is a bad person" -- "is a person of bad character or that he has a disposition to commit crimes"?
THE COURT: Well, I think there is -- the sentence in the second paragraph states that, "It may be considered only by you" -- or, "may be 12535

considered by you only for the limited purpose of determining if it tends to show....” so it tells exactly what the limitations are.

MR. SANGER: I suppose -- I realize 1108 turned the law on its head here, but one of the things that jurors were always warned of in 1101(b) was that very delicate matter that they’re not supposed to consider it for proof of the fact that the person is of bad character or has a disposition. And to the extent there’s 1101(b) that’s not 1108, we’re not giving them that admonition.

THE COURT: I think it’s clearer if the one instruction, 2.50, tells them it can only be considered for certain purposes, and the next instruction tells them that they can consider it for a disposition. I think it’s more confusing to do it the way you’re suggesting.

Okay. 2.50.01.

MR. SANGER: We once again have a new one, which is fine. It removes some brackets.

MR. SNEDDON: We just took out the ones that didn’t apply in this case, which were the --

THE COURT: Right. So you left --

MR. SNEDDON: -- force and violence.

THE COURT: You left in A and took put B, C, D, E and F, which I think is appropriate, and then you took out “she” in the next paragraph.

MR. SANGER: We do have a special on 1108, 12536

but I don't think it's going to impact this --
THE COURT: Okay.
MR. SANGER: -- so much.
And the only objection I'd -- I don't want to be too picky here, but since "any of the following" is one --
THE COURT: Is only one.
MR. SANGER: -- it should just say, "Sexual offense means a crime under the laws of the state or of the United States that involves...," and then just take out "any of the following," "any conduct made criminal by...."
MR. FRANKLIN: Striking "any of"?
MR. SANGER: Strike "any of the following," and then it will just read "involves any conduct made criminal by...."
THE COURT: Okay. You stop at "the United States"; is that right?
MR. SANGER: No. You just say "that involves...," and it's just one sentence. "Sexual offense means a crime under the laws of the state or of the United States that involves any conduct made criminal by Penal Code Section 288."
THE COURT: All right. And just keep the sentence running.
MR. SANGER: Yeah. And actually, as I think about it -- I mean, I understand there could be conduct outside the state. 12537

THE COURT: Yeah.
MR. SANGER: But there's no definition of the laws of other states or the United States, so how would a jury know if something violated a federal law or a state law of another state?
THE COURT: Because it has to involve conduct made criminal by Penal Code Section 288. I mean, that's what the real subject matter is.
MR. SANGER: That's right. "Sexual offense means a crime that involves conduct made criminal by" -- it's not a big thing. It's just a thing.
THE COURT: Okay. So I do think I'll accept your change there and take out the words "any of the following," and the second paragraph at the end, colon, and go straight. "Conduct" becomes part of the sentence. "Any conduct," okay?
And the next one is 2.50.1, "Evidence of the other crimes must be proved by a preponderance of the evidence," I'll give that.
And then 2.50 -- 2.50.2, "Definition of preponderance of the evidence," I'll give that.
MR. SANGER: Yes. So 2.50.1 and 2.50. --
THE COURT: 2.
MR. SANGER: -- 2. Excuse me one second.
Okay. So on 2.50.1, we have proposed a Special Jury Instruction No. 4 that I think would basically be a suggestion to modify 2.50.1 with some or all of the language of that. Could we come back 12538

to that, or --
THE COURT: Yes.
The next one's 2.51. 2.51, "Motive." I'll
give that.
The next one is 2.60, "Defendant not
testifying. No inference of guilt," I'll give that.
2.61, "Relying on the state of the evidence,
defendant may...," I'll give that. 2.61.
MR. SANGER: I think 2.70 is withdrawn by
both parties. Put it this way: I believe it was
withdrawn by the People in their latest set, and we
would also withdraw any request for it.
THE COURT: Okay. And that leaves 2.71,
"Admission defined."
MR. SANGER: Yes. And the People's latest
version has the bracketed gender issues resolved.
THE COURT: That's okay. I'll give that.
2.71.5, "Adoptive admission."
MR. SANGER: We would withdraw -- excuse me.
We would withdraw any request for that and object to
that being given.
MR. SNEDDON: This will pretty much rise and
fall on the basis of your previous decision as to
the failure to respond to the accusation on the
program, so that's the theory we had. So I would
guess that this would be one that you would refuse.
We're not withdrawing it, but I think -- to be
consistent, I think that I need to point out that 12539

1 the Court will probably refuse it.
2 THE COURT: Yes, that's correct, I will
3 refuse it.
4 Then 2.71.7.
5 MR. SANGER: And we would -- at the
6 beginning of the trial we submitted a bunch of
7 these, obviously not knowing exactly what was going
8 to happen, but this is one we would withdraw and
9 object to it being given.
10 MR. SNEDDON: And it seems to me this is one
11 that specifically applies, because it says it's a
12 pre-offense statement. And we're talking about the
13 admissions.
14 MR. SANGER: But this is designed -- I'm not
15 looking at the use notes, but I will. I mean, this
16 is designed for a situation where somebody's talking
17 about, "I'm trying to rob the bank," or "I got a gun
18 in case I want to rob a bank," something like that.
19 It doesn't add anything to the --
20 THE COURT: What did you have in mind?
21 MR. SNEDDON: Hearsay statements about
22 sleeping with teenaged boys.
23 THE COURT: So you've listed, "Evidence has
24 been received from which you may find that an oral
25 statement of intent, plan, motive or design...."
26 You used all of the words in the instruction. What
27 words were you thinking of?
28 MR. SNEDDON: Well, I think -- I think all 12540

four of them apply. But that's his intention, that he plans to do that, and it's a motive for the crime in this case, and he has a design on young teenaged boys.
MR. SANGER: That's not the way the word's used. That was clever, though.
MR. SNEDDON: It's not what?
MR. SANGER: You know, it's actually interesting, because 2.71 may not even apply. However, 2.71.7, basically I think what the prosecution is saying is that there's statements that were made that the admissions, under 2.71, would be statements that were made that would be admissions of something that might pertain to the 1108 evidence. It's not admissions as to the future conduct.
And 2.71.7 I believe pertains to the kind of pre-offense statements that I referred to, like "I'm going to go out and buy the gun because I might want to rob a bank some day," and then the person robs a bank, and then you say, "Well, he said he was going to do that."
MR. SNEDDON: And our contention is that these statements indicate a predisposition and his intention to continue in this kind of conduct from which the jury can draw a reasonable inference that this conduct occurred with regard to Gavin Arvizo.
MR. SANGER: Well, then, so that's 1108. 12541

MR. SNEDDON: No, it's not 1108. It's an admission. It's an admission on his part. It's his statement. 1108 is conduct that was viewed with regard to other individuals.
MR. SANGER: Well, I don't mean to get involved in a direct argument with Mr. Sneddon, but addressing the Court, the predisposition -- the word "predisposition" is -- evidence pertaining to predisposition is inadmissible unless it comes in under 1108. So this can only be talking about 1108, in which case it's redundant. It doesn't make any sense the way it's worded. 2.71 would be the admission that would pertain to 1108. It's something that was said after the fact that the prosecution wants to argue bears on 1108 events having occurred.
2.71.7, there is no -- despite the creative use of the word "design," there is no predisposition issue under 2.71.7. If you say somebody has -- you know, we're talking about robbing a bank, I suppose they're talking about robbing a bank, it's not a predisposition. It would go to intent or something.
So I think for purposes of argument -- I mean, nobody's going to understand this unless it's argued by the lawyers. So for purpose of argument, 2.71 gives the prosecution the opportunity to argue that things that were said on the tape -- and the only statements that came in by Mr. Jackson are 12542

pre-offense statements. So the things said on the tape they could argue were an admission of some sort that pertains in some way to the 1108 evidence.
MR. SNEDDON: That is not --
MR. SANGER: 1108 evidence --
MR. SNEDDON: -- what we're saying.
MR. SANGER: Excuse me one second.
1108 evidence, then, is offered for the purpose of showing there's some predisposition, which are propensity. But 2.71.7 doesn't advance the ball for anybody.
THE COURT: This requires -- in your mind, it requires some statement that shows at that time he's contemplating a crime of some sort.
MR. SANGER: That he's --
THE COURT: So his statements --
MR. SANGER: -- subsequently charged with.
THE COURT: -- that he allows young boys to sleep in his room doesn't show a crime. That's what you're saying?
MR. SANGER: Well, that's correct. But it doesn't show the intent, plan, motive or design. It -- he's talking historically at that time. If you remember, the statements that were selected were statements with regard to Gavin Arvizo that occurred prior to 2003, and then also a remark -- we have it here someplace, but a remark to the effect that he has allowed other children to sleep in his bed. 12543

THE COURT: I guess I'll have to go back to exactly what statements you're relying on for this instruction.
MR. SNEDDON: I'm relying on the statements that the Court allowed to be admissible as admissions on the part of the defendant. And that is those admissions in the Bashir video. And I think I provided the Court with a copy of what I believe to be consistent with the Court's ruling earlier before the trial started, and I believe those statements apply.
You know, I think the problem here is that, you know, an admission is something from which the jury draws an inference. Whereas a confession would be a complete -- would be a completed statement as to all elements of the crime. And -- and the reason that the Court ruled that those admissions were to come before the jury is because it does indicate that he has a motive and intent to sleep with young teenaged boys, and he has admitted to doing so, which allows the jury to draw an inference that he did so with Gavin under circumstances which are directly related to the crimes alleged in this count.
MR. SANGER: Actually, I'm looking at what was submitted this morning by the prosecution, and it's a document that doesn't have anybody's name on it. And I think Your Honor asked your clerk to 12544

check. That's the one that was filed by the
prosecution and --
THE COURT: Yes, I have it.
MR. SANGER: I'm just looking at it now,
again having received it this morning. I'm certain
these are not the correct excerpts.
MR. SNEDDON: Well --
THE COURT: "The correct excerpts" meaning
what?
MR. SANGER: Well, Your Honor ruled earlier
that certain statements could come in if they laid
the foundation and got the tape in, and they got --
they introduced the Bashir tape that had some
statements. They also sought to introduce another
tape that never came into evidence.
But, for instance, page two here, it says,
on page 41, there's a discussion between Gavin and
Bashir. You know, I just look at that, and I know
that wasn't one of the parts that the Court
approved.
We could go back and figure it out, but
aside from that, the general proposition is that
what they wanted to introduce were statements of
Michael Jackson that could be construed as --
THE COURT: Admissions.
MR. SANGER: -- admissions that of course
would have to be admissions as to prior conduct, not
future conduct, because there's no future conduct 12545

yet by definition. That would come in under 2.71.
We are proposing in a special instruction
that the Court not delineate the exact paragraphs,
and instead, with both the Bashir tape and the
outtakes, the Court categorize it as statements by
Michael Jackson that pertain to his relationship
with children.
THE COURT: I know that. But I can't see you
getting anywhere with that one, so --
MR. SANGER: Oh, you can't. Well, it just
seemed to be an easier way to do it. But the point
of the story is, whether we do it that way or not,
that's what it was about. The Court was ruling that
statements --
THE COURT: But what I had ruled was that
certain statements, if the jury determined that they
were admissions, could be used for the truth of the
matter asserted. And I asked Mr. Sneddon to give me
a list of the statements that he thought he would be
relying on to submit to them for admissions.
And the purpose of that was that I needed to
know what statements I might allow you to put in for
the truth of the matter asserted which were
connected to the admissions and not generally
connected to everything he said about children.
MR. SANGER: Okay.
THE COURT: Which is what you threw in in
your instruction. 12546

So let's take a break.
(Recess taken.)
THE COURT: Okay. On 2.71.7, I will go ahead and give that, but I'll just, I think, limit it to "intent." Take out "plan, motive and design."
MR. SANGER: And I believe this is correct, Your Honor, but just so I'm clear on the record, we did withdraw our request and we object to this.
THE COURT: All right. It's clear now.
MR. SANGER: Okay. Thank you.
THE COURT: 2.72, we don't need that anymore, do we?
MR. SNEDDON: I think that's a sua sponte instruction.
THE COURT: Okay. 2. -- all right. I'll give that.
2.80, that's expert testimony, I'll give that.
2.81 --
MR. SANGER: Could you slow down one second, Your Honor, please? There's two issues here. Okay. On 2.80, you're giving their newer version?
THE COURT: Yes.
MR. SANGER: Okay.
THE COURT: 2.81. Actually, 2.81 is the one that you originally had requested, right?
MR. SANGER: We had requested, well, yes, in 12547

advance of the trial.
THE COURT: So that's given.
MR. SANGER: Yes. I think there was some such testimony.
THE COURT: And then 2.82, "Hypothetical questions," we'll give.
MR. SANGER: Yes.
THE COURT: And 2.83, "Resolution of conflicting expert testimony," I'll give.
2.90, "Presumption of innocence," I'll give.
Now we come to the principals and accessories. My take on this is that we shouldn't be giving that at all, 3.00, 3.01, 3.02. In this case we're dealing with -- on one crime we're dealing with conspiracy, and that has all the instructions that relate to the relationship between co-conspirators, which are different than principal and agent.
MR. SANGER: And we would -- I'm sorry, we would withdraw 3.00, .01 and .02, and object to them being given.
MR. SNEDDON: We agree.
THE COURT: Okay. So I'll withdraw 3.00, 3.02 -- 3.01, 3.02.
3.10 withdrawn? This is the definition of an accomplice.
MR. SANGER: Well, it appears that the prosecution has withdrawn 3.11 and .12, but not .10. 12548

MR. SNEDDON: There was some method in our madness in that, Judge. And the method was -- or the madness was perhaps that we felt that the conspiracy instructions adequately covered any liability issue, and we wanted to make sure that if there was going to be a discussion as to whether these accomplice instructions need to be done, there at least be one left in to make it a conscious ruling on the record.

And our feeling is the same as the Court's, and that is the conspiracy instructions adequately have addressed the involvement of other participants in this crime, but we just felt that it should be discussed and either withdrawn or objected to on the record by the defense, and that's the reason we left the one in and took the others out.

THE COURT: Okay.

MR. SANGER: Well, there's a difference between the aiding, abetting and principal instructions, which we agree should go out, and the accomplice instructions, because those have to do with the testimony of the accomplice as opposed to criminal liability.

In other words, I agree that the conspiracy instruction covers the liability of individuals involved in the offense for substantive law purposes, but the accomplice instructions pertain to whether or not corroboration is necessary for an 12549

1 accomplice witness. That's a different issue.
2 THE COURT: I think the accomplice
3 instructions don't apply either, so let's take them
4 one at a time.
5 I'm not going to give 3.10. And do you want
6 to object to that?
7 MR. SANGER: Yeah, we're requesting that the
8 accomplice -- all the accomplice instructions be
9 given. So starting with 3.10, yes, we request it.
10 THE COURT: I'm not going to give 3.11. I'm
11 not going to give 3.12. I'm not going to give 3.13.
12 I'm not going to give 3.14. I'm not going to give
13 3.16. I'm not going to give 3.18. I'm not going to
14 give 3.19. And all of those were relating to
15 accomplices.
16 3.31, "Concurrence of act and specific
17 intent."
18 MR. SANGER: Now, the prosecution has
19 provided, this morning, a fuller version of 3.31.
20 THE COURT: That's correct. I'm looking at
21 that.
22 Tell me when you've had time to read it.
23 MR. SANGER: I've had time to read it, and I
24 have a question so far, two questions.
25 One, I'm not sure that the specific intent
26 on conspiracy is exactly right. But let me look at
27 that.
28 The other one is the attempted lewd act 12550

requires the specific intent to commit the lewd act, but it also requires the specific intent to arouse or appeal to or to gratify, I think.
So an attempt, you have to have the specific intent to commit the actual crime, plus the specific intent that's -- I'm sorry, that's required --
THE COURT: Is the same.
MR. SANGER: -- in the definition, yes. And then you also have to specifically intend to commit that crime. It's an attempt.
THE COURT: Do you want to respond to that?
MR. SNEDDON: If they want to put it in, that's fine, Judge. I think what we envisioned there was that there is going to be another instruction as to what that crime envisions and entails, but I see no harm in just dropping down that section from above and adding it on there. Actually, I'm not sure that that's even -- I mean, it's a little redundant because that's what the crime is. I'm not so sure you just couldn't take out "the specific intent to commit a lewd act" and just put in "the specific intent to arouse, appeal to, or gratify the lusts or passions or sexual desires of the perpetrator or the child." That's really what it is.
THE COURT: Are you conferencing on this?
MR. SNEDDON: No, I think there was some confusion on -- 12551

MR. FRANKLIN: Can I have just a moment to confer with Mr. Sanger?
Bob?
(Off-the-record discussion held at counsel table.)
MR. SNEDDON: No, I think I was on the right page.
THE COURT: Okay. So how do you want to change that, then?
MR. SNEDDON: Well, I would suggest that what we do is simply start with the word where it says “specific intent,” and then just take out “commit a lewd act with a child under the age of 14,” and just put in “requires a specific intent to arouse, appeal to, gratify the lusts and passions or sexual desires of the perpetrator or the child.” In other words, take the same exact language --
THE COURT: Okay.
MR. SNEDDON: -- for the crime above and just drop that down.
THE COURT: Okay.
MR. SANGER: Well, I would propose that, instead, say, “requires the specific intent to commit the” -- “a lewd act with a child, with the further specific intent to appeal to, gratify” -- “or gratify the lusts or passions or sexual desires.” Because technically in an attempt, you have to have the specific intent to commit the act. 12552

1 And then in order for it to be an attempted 288,
2 it's got to be with the further specific intent of
3 arousing passions and so on.
4 The way the prosecutor suggested it, it
5 eliminates the specific intent to commit the act,
6 and it could be interpreted as just, you know, some
7 intent to arouse passions on the part of the
8 individual.
9 MR. SNEDDON: Just add them both in. That's
10 fine with me. I don't really care.
11 THE COURT: Okay.
12 We don't have 3.31.5 in your new set, right?
13 MR. SANGER: They withdrew it. But before
14 we get there, is the Court giving 3.31 with that
15 modification? Was that the final ruling?
16 THE COURT: Yes.
17 MR. SANGER: All right.
18 MR. SNEDDON: Judge, it occurs to me that --
19 THE COURT: Why wouldn't you give 31 --
20 3.31.5?
21 MR. SNEDDON: With regard to what crime?
22 It occurs to me that 3.30 needs to be given because
23 of the general intent crime on the lesser, according
24 to the use note.
25 THE COURT: I know we have to give a general
26 intent instruction on the lesser and --
27 MR. SNEDDON: That would be 3.30, I think,
28 which we didn't request because we didn't see the 12553

lesser at the time. But I agree with the Court, it has to be given, so --
THE COURT: Well, there's another place that the general intent applies, isn't there, in the false imprisonment, when we get to the definition describing the conspiracy?
MR. SNEDDON: You're correct. According to the use note, that's correct.
THE COURT: So when we are thinking of giving the 3.30, it seems to me maybe we should put that with the definition of the lesser-included at the time we give the instruction on the lesser-included. And then because of the complications of the specific intent in the conspiracy instructions and specific intent to commit -- this is similar to what you were just saying, the specific intent to commit a crime, specific intent to commit false imprisonment, which has a general intent, we need to be very cautious about how we instruct the jury on that issue. And I don't want to mix up the two. Even though we're dealing with a general intent on both of those crimes, they're going to treat the approach to the general intent separately on each crime.
So I think what we should do is give 3.30 separately at each point, at the right point. So --
MR. SNEDDON: I think that's the safest thing to do. That way it doesn't confuse it. 12554

THE COURT: If we're careful, it won't.
Even then we could. But we'll work on that.
MR. SANGER: There is a problem, I think,
with conspiracy, getting that confused and saying --
THE COURT: I know.
MR. SANGER: Yeah.
THE COURT: That's what I was bringing up.
That's why I want to be careful about how we deal
with giving the general intent instruction here.
MR. SANGER: Okay. And, I mean, we all
agree it has to be given with regard to the lesser.
THE COURT: Yeah.
MR. SANGER: But does it have to be given in
conjunction with the underlying offense for
conspiracy?
THE COURT: I think so. Because since it's a
general intent crime, all they have to do is intend
to do the acts that, in effect, are false
imprisonment.
MR. SANGER: I understand. I'm just
thinking --
THE COURT: If they intend to do those acts
and they agree to do those acts, specifically they
intended to do those acts, they intended --
specifically intended to agree, then you have a
conspiracy within the law.
MR. SANGER: So you have the specific intent
to agree. We've got that. And then the next is a 12555

specific intent to commit the crime. And if you have a specific intent to commit a general intent crime, don't you have to have a specific intent to commit that crime?
THE COURT: Yes. But -- but to get to committing the crime itself, that's not enough. You know, the law is, you have to not only have the intent, you have to commit the crime. You have to do the act. And the act is a general intent --
MR. SANGER: I'm with you on all of that.
What I was going to say is, in the instruction 9.60, it says, "In order to prove this crime, each of the following elements must be proven." The first is, "A person intentionally restrained...,"
dah-dah-dah-dah-dah.
Isn't that enough? The reason you give a general intent instruction is to eliminate -- seems to me, is to eliminate the situation where somebody, for instance, would be convicted of breaking and entering when somebody -- they're walking down the sidewalk and somebody pushed them through the door. They didn't have the general intent to commit the act. Otherwise, I mean, the instruction protects defendants against being convicted of an act that was not -- was not intentional in a general sense.
Okay?
How would the defendant be protected here where you have to have the specific intent to commit 12556

the crime and the crime is to intentionally do something? In other words, I don't know that you're -- that we're furthering the purpose of the general intent instruction. It doesn't really help or hurt the prosecution. Generally an instruction that would give a defense to the defense.

But my concern is, in giving -- in talking about this, if it's not necessary, and I understand the Court thinks it is --

THE COURT: It could hurt the prosecution if the jury thinks that they have to have the specific intent to have false imprisonment. In fact, it --

MR. SANGER: But you do. You have to have the specific intent.

THE COURT: No, you can just have specific intent to do the acts.

MR. SANGER: Right. Specific intent to do the act.

MR. SNEDDON: Intent to do the act.

THE COURT: What are you saying?

MR. SNEDDON: It's the intent to do the act. I think it needs to be given.

THE COURT: I think it needs to be given, too. It was the question of giving it correctly in a way that's not -- you know, that is helpful and not confusing.

MR. SNEDDON: Well, it seems to me the only logical place to give it would be when you give the 12557

1 other instructions on defining false imprisonment.
2 If you do it anywhere else, I think it could be
3 misleading.
4 THE COURT: Right. That's what I think, too.
5 And I think that we should give 3.30
6 probably twice, at two different places, so that
7 we're careful as to how it relates to each of those
8 two crimes.
9 MR. SNEDDON: Exactly.
10 MR. SANGER: I would agree -- if you're
11 going to do it, I would agree that that's -- that
12 would be the way to do it.
13 THE COURT: Okay.
14 MR. SANGER: My only objection is to the
15 second one, which is giving it in conjunction with
16 the --
17 THE COURT: Well, when we get to that, we'll
18 try to work through that.
19 So we are now -- we're at 3.30, so we need a
20 3.30 prepared, but we're not going to give it at
21 this point.
22 MR. SANGER: And you need two 3.30s prepared
23 based on what the Court just said.
24 THE COURT: Yeah, but we may tie -- yeah.
25 MR. SANGER: I'd ask, just while we're on
26 that subject, perhaps the second 3.30 could be
27 worded to the effect that, "You were already
28 instructed that conspiracy requires the specific 12558

intent to agree and the specific intent to commit an underlying offense. One of those underlying offenses is a general intent crime," something like that. So it makes sense otherwise.
THE COURT: I think so.
MR. SANGER: It's going to be a sea of words and they're never going to figure it out.
THE COURT: Yeah. I think so. So we can....
The next one we're on here is 4 --
MR. SANGER: 3.31.5. Did you rule on that?
MR. SNEDDON: No. And I have a -- oh, go ahead.
THE COURT: I think what we should do with 3.31 -- 3.31.5 is to say, "In the crimes charged in Counts 1 through 10," and for --
MR. SNEDDON: Judge, could I be heard on that?
THE COURT: Yes. Just a second.
I think it should say, "In the crimes charged in Counts 1 through 10, and in the lesser crimes, there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless the mental state exists, the crime to which it relates is not committed. The mental states required are included in the definitions of the crimes set forth elsewhere." 12559

MR. SNEDDON: Judge, I believe that this instruction is actually directed when there's a mental state other than specific intent. And I believe that this instruction ought to be limited to those portions of the child molestations that requires the mental state of the arousal part of it. This is like for second-degree murder, where you have malice and some of the other mental state degrees, like if it was knowingly and things like that.

So I think it would -- that the part that you just talked about really is covered by 3.31. And this is when there's a special mental state that's different from the specific intent. And the only one I can think of here would be the arousal part of the 288 offense. Now, there could be others, but --

THE COURT: Do you agree with that?

MR. SANGER: No. I was just reading the use note, which is singularly unhelpful. It seems to me that there are other mental states. I think the arousal, that's a specific intent. So I disagree with Mr. Sneddon, respectfully, that that is a mental state other than specific intent. But there are references to "willful, knowing, malicious." Those are mental states, I suppose.

THE COURT: Mr. Dunkle, what do you think?

MR. DUNKLE: I agree with Mr. Sanger on 12560

that.
MR. SNEDDON: Just for the record, to make it complete, Mr. Franklin disagrees with me and he agrees with Mr. Sanger, so it looks like I'm on the short end of this one.
MR. DUNKLE: It does say, "specific intent for 288, to arouse." It says "specific intent."
MR. SNEDDON: Then it shouldn't be given.
MR. SANGER: I think it should be given. I think it should be given the way the Court indicated.
THE COURT: All right. We'll give it that way.
I think, though, Mr. Dunkle, the first time you ever spoke in here, you conceded to your boss. That was a bad start right there.
The next one is 4.51. The D.A. doesn't have that. Let's see, "Alibi." We don't need that.
MR. SANGER: That's withdrawn.
THE COURT: Do you agree?
MR. SNEDDON: Yes.
THE COURT: 4.71, "Proof need not show exact time of crime."
MR. SANGER: I think both sides would withdraw that. The prosecutor has withdrawn it, and we would also.
THE COURT: Withdrawn.
4.71.5, "When proof must show specific act 12561

1 or acts within time alleged."
2 MR. SANGER: This was a new instruction that
3 was presented this morning by the prosecution. We
4 do not object to it, except for the last sentence.
5 And as to that last sentence, perhaps the Court
6 could just put a Post-it on that, because we do have
7 a special.
8 THE COURT: That you submitted for the first
9 time this morning.
10 MR. SANGER: Yes. Yes. I'm not faulting
11 the D.A.
12 MR. DUNKLE: That one we submitted on the
13 28th.
14 MR. SANGER: Wait a second. Mr. Dunkle has
15 something to say.
16 MR. DUNKLE: I think that one was submitted
17 on the initial proposed jury instructions on the
18 28th of February.
19 MR. SANGER: There you go. That's why he's
20 here.
21 So if we could, we would agree with all of
22 it except for the last sentence, and if the Court
23 could just hold up on the last sentence until we
24 determine what we are doing on that subject.
25 THE COURT: Okay. I do think that this
26 correctly states the law in that regard, though.
27 MR. SANGER: Well, there's an issue under
28 Blakely as to whether or not there has to be 12562

unanimity on the specific acts, and there is a question as to whether or not it has to be reflected in the verdict forms. So we aren't there yet and I think we need to discuss that, because I don't necessarily think everything has to be put -- specified in the verdict forms, but it does have to be dealt with.
THE COURT: Okay. So it may be that this last sentence is just fine, but it just depends on how we handle the Blakely issue.
THE COURT: Okay. The next one is 6.00, "Attempt."
MR. SANGER: Don't have an objection to it. However, I think it should be given just before the instruction on the count, whatever count it is that's the attempt count.
THE COURT: Put it in a different order.
6.01, "Conspiracy and overt act defined." Looks like the same. You didn't change it. You just put it double-spaced, in a different format.
MR. SANGER: Look the same to me, but I don't know. I read it quickly.
THE COURT: It looks the same. Is it the same?
MR. SNEDDON: As far as I know it is.
THE COURT: Okay. I'll give that one.
And 6.11, any problem with that? Just took out the parentheticals. Left the words in. 12563

MR. FRANKLIN: Added “Count 1.”
THE COURT: Added “Count 1.”
MR. SANGER: Actually, it just said “count” in the other one.
THE COURT: Okay. We’ll give that one.
MR. SANGER: Can I -- before you do that -- I’m sorry, I didn’t speak quickly enough, I suppose, on the substance.
What “natural and probable” consequences are involved here, other than what is alleged to have been agreed to to start with? I suppose in giving a full definition of conspiracy to the jury, this does it. But this isn’t a typical thing where a bank robbery goes wrong and somebody gets shot, and then the question is, is that a natural and probable consequence of agreeing to do a bank robbery? The People’s theory is Michael Jackson intended all of this. Obviously we dispute that, but that’s their theory.
MR. SNEDDON: Well, that they intended to isolate and control the family, and it’s a natural and probable consequence of that that they took them to the Calabasas Inn and held them there against their will. And that would be something that, even though he didn’t know about it, the jury could construe as being a natural and probable consequence from the agreement to control and isolate them, or to falsely imprison them. 12564

MR. SANGER: But -- sorry.
MR. SNEDDON: So it should be given.
MR. SANGER: An agreement to control and isolate is not --
MR. SNEDDON: I used the wrong words, Counsel.
MR. SANGER: Yeah, it would have to be the agreement to -- the specific intent to commit these crimes.
THE COURT: Okay. I'll give it as prepared. 6.12.
MR. SANGER: And we would withdraw our request for that, for 6.12, and object.
THE COURT: On what basis do you object?
MR. SANGER: I think it's -- it unduly emphasizes one aspect of the People's case. It's already covered in general terms. I understand it's a CALJIC instruction, and I'll submit it.
THE COURT: All right. I'll give 6.12.
THE COURT: 6.13, "Association alone does not prove membership in the conspiracy."
MR. SANGER: That's requested by both sides.
THE COURT: I'll give that.
6.14, "Acquaintance with all co-conspirators not necessary," I'll give that.
MR. SANGER: We would withdraw our consent to that and object. I'm speaking a little bit behind here. Your Honor already ruled, but -- 12565

THE COURT: 6.16, “When conspirators not liable for act or a declaration of co-conspirator,” I’ll give that.
6.17, “Conspirators not bound by act or declaration of non-conspirator,” I’ll give that.
6.18, “Commission of act in furtherance of a conspiracy does not itself prove membership in the conspiracy,” I’ll give that.
6.19, “Joining conspiracy after its formation,” I’ll give that. Oh, wait. I don’t have that in the new form.
MR. SANGER: That was apparently withdrawn by the prosecution, but I think it’s -- I think it’s appropriate. We requested it.
THE COURT: Okay. I’ll give that.
6.20, “Withdrawal from a conspiracy,” I’ll give that.
6.21. 6.21, “Liability for acts committed after termination of conspiracy,” I’ll give that.
6.22, “Conspiracy” --
MR. SANGER: There’s a revised version.
THE COURT: Yeah, “Case must be considered as to each defendant.”
MR. SANGER: Okay. I have two objections to 6.22. And I do not object to the amendment at the beginning to say “the defendant” rather than “each defendant,” since we only have one person accused of this conspiracy, or accused in the indictment of 12566

this conspiracy. So that's okay.
The two problems I have are, one, this misstates the elements of the offense. And it's somewhat beyond me. I know this is CALJIC once again, but why it's being restated and why "conspiracy" is being restated in different terms. It says, "There was a conspiracy to commit one or more of the crimes of...," and this leaves out the specific intent to agree.
And the second part of that, or the second objection to this, is that the last two sentences violate Blakely, that there has to be a jury determination as to the underlying facts, and it has to be unanimous, beyond a reasonable doubt. And I think we've addressed that in a special.
I would take the position that, under Blakely and the U.S. Supreme Court decisions following that, that any instruction that says that you are not required to unanimously agree as to who committed an overt act or which overt act was committed so long as each of you finds beyond a reasonable a doubt that one of the conspirators committed one of the acts, that would violate the unanimity and proof-beyond-a-reasonable-doubt requirements of Blakely.
THE COURT: Do you want to say anything?
MR. SNEDDON: Well, we're going to take this up, I guess, later, but Blakely doesn't have 12567

anything to do with this case. Blakely is a sentencing allegation finding. This is not a sentencing allegation finding. This is the law of conspiracy that's been in effect for years and years and years in California. It doesn't have anything to do with Blakely.
MR. SANGER: It obviously does. I mean, Blakely doesn't just talk about sentencing. And the cases that have construed Blakely since it came down make it clear that it applies to anything that has to do with imposing criminal liability on a defendant.
THE COURT: Okay. I'll accept it as it is at this point. We'll see if it changes as we discuss the others. But I have read the others.
6.23 --
MR. FRANKLIN: Judge, our version on 6.22, I see that I, down -- in the fourth line down on the second paragraph, I spelled "false imprisonment" and left off the "ment," if that could be noted.
MR. SANGER: Where?
MR. FRANKLIN: On 6.22, the fourth line down in the second paragraph, where it lists the crime. "Extortion, child abduction, and false" -- it says "false imprison."
THE COURT: Not mine.
MR. SANGER: Not on mine.
MR. FRANKLIN: Then I've got an earlier 12568

1 version and I do apologize.
2 THE COURT: You've got -- you've got an
3 erratic computer.
4 6.23.
5 MR. SANGER: Okay. Now we have -- this is
6 the brand-new one.
7 THE COURT: Ahh, yes. Now I need to put this
8 in and take this out.
9 Is there any problem with that that you see,
10 Mr. Sanger?
11 MR. SANGER: I haven't had a chance to
12 really look at it. This was more recent, so could I
13 have just a moment, please?
14 The only thing I would object to so far, and
15 I'm up to Overt Act No. 9, is that they've
16 capitalized all of the names of the people they
17 chose to capitalize and not capitalized the other
18 people. And I looked up and Your Honor was gone,
19 and I'm glad to see you've returned.
20 THE COURT: I've got all this trash I was
21 throwing on the floor. I was taking an opportunity --
22 MR. SANGER: I thought it was something I
23 said. All of a sudden you were gone.
24 In other words, they capitalize Ronald
25 Konitzer, Dieter Weizner. They capitalize Frank
26 Tyson and Marc Schaffel, Vinnie Amen, but they don't
27 capitalize Janet Arvizo or anybody else 's name.
28 MR. FRANKLIN: Judge, there was a reason. 12569

This language was simply copied from the language of the indictment itself. And it was thought appropriate in the indictment to capitalize the names of -- the person's name as conspirators, or co-conspirators.
MR. SANGER: That doesn't mean it's right in a jury instruction. Seems to me you capitalize everybody's names or you don't capitalize anybody's names. This is an instruction by the Court. And to make it look like the Court is emphasizing one group of people over another I think would be inappropriate. And I'm sure, as Mr. Franklin mentioned, due to whatever he called it, the modern wonders of the computer, you can search these names and you can change them fairly instantaneously.
THE COURT: Well, since we are going to give all the jurors copies of it, I think they should be the same.
MR. FRANKLIN: I'll do that.
THE COURT: Just let me finish picking up this paper.
Okay. The next one is 6.24.
MR. SANGER: I'm sorry, I'm still reading this instruction. Can I have just another minute?
THE COURT: Okay.
MR. SANGER: Thank you.
Maybe one way to do this, I was just conferring with Mr. Dunkle on this, Overt Acts 19, 12570

21 and 22, let's just stick with those three for the moment, we would renew our 1118.1 motion, I think is procedurally the way to get to it.

And we could renew our 1118.1 motion as to all matters, but just specifically looking at those overt acts, based on the evidence in this case, they don't seem to have anything to do with the alleged conspiracy. They may or may not have something to do with the alleged other acts, and so under whatever appropriate code section, 1118.1 or some other code section or some other procedure, we would move to strike those from the jury instructions and to have the Court, as a matter of law, finding that those are not relevant to the conspiracy count.

THE COURT: I'm not really willing to entertain such a motion while we're trying to do jury instructions. It's untimely, and it's not -- doesn't really solve problems. It just creates them, so --

MR. SANGER: Okay.

THE COURT: But have you read the rest of the --

MR. SANGER: I was going to say, based on the Court's ruling on that, other than correcting the font or the caps, the lower case, whatever we're doing, I don't have any further objection to 6.23.

THE COURT: Okay. So there's no misunderstanding, I think what you should do is 12571

leave the “Michael Joe Jackson” in all caps, and then put the rest of the names that are involved other than Mr. Jackson’s in lower cap, you know, with the proper capitalization.
MR. SANGER: Could I be heard on that? There’s no other instruction where “Michael Joe Jackson” is in all caps. This is a jury instruction. I think it should just be regular lower case.
THE COURT: No, I think it puts the right emphasis on each of the allegations, so you understand, when you read the allegation, it’s “Michael Joe Jackson did this,” and “Michael Joe Jackson…” I don’t think it’s at all harmful to you as you think.
The 6.24. Okay. No objection? I’ll give that.
MR. SANGER: I’m just looking at it quickly here in the book. Just one more second, please. All right. Thank you.
THE COURT: 6.25.
MR. SANGER: The revised version. Subject to the verdict forms, working that out, if that’s the way the Court ultimately rules the verdict form should look, then this will be acceptable.
THE COURT: Okay. And then the next one, let’s see, I have in the old stack is 6.26. 12572

MR. FRANKLIN: That's the -- essentially
it's a guide for the jury verdict form.
THE COURT: So we don't need that.
MR. FRANKLIN: No.
THE COURT: And then 9.60, "False
imprisonment."
MR. SANGER: And this is the one general
intent underlying offense.
THE COURT: Yes. And the question, I guess,
is the 9.60 -- CALJIC 9.60 is what? Is it a felony
that they're reporting?
MR. SNEDDON: Yes.
MR. SANGER: False imprisonment, 236.
MR. SNEDDON: The misdemeanor instruction
for false imprisonment is back in the 10.00 series,
I believe.
THE COURT: 16.00.
MR. SNEDDON: Or 16.00 series, yeah. This
is the felony one, which is the appropriate one.
THE COURT: And do you agree with that?
MR. SANGER: That the felony instruction
should be given rather than the misdemeanor? Yes.
THE COURT: You said "yes"?
MR. SANGER: Yes, sir. I was just
clarifying the question, but --
THE COURT: Okay. Have you looked at this
one, 9.60? Is that okay?
MR. SANGER: Yes, that seems to be the 9.60 12573

from the book.
THE COURT: Okay.
MR. SANGER: And I hear Mr. Franklin saying something. Is it not?
MR. FRANKLIN: There's only an introductory phrase indicating that he is accused of that in the conspiracy count. Otherwise, it's from the book.
THE COURT: Where it says, "Defendant is accused in Count 1"?
MR. FRANKLIN: Yes.
THE COURT: That's the introductory phrase?
MR. FRANKLIN: "Of having conspired to commit."
MR. SANGER: That's fine.
THE COURT: And then the next one is 9.70.
MR. SNEDDON: Judge, can we hold on for a second, raise an issue with the Court that just occurred to me?
THE COURT: Yes.
MR. SNEDDON: I'm wondering if we need to give -- probably not, but I just want to bring it up. Inasmuch as this is not a lesser-included, it doesn't seem like we need to give the misdemeanor false imprisonment instruction, because -- although conspiring to commit a misdemeanor is a felony.
THE COURT: Right.
MR. SNEDDON: So maybe it needs to be stated in the alternative. Misdemeanor is no force or 12574

violence. In other words, the -- as alleged in the indictment, it's alleged as a felony. I think it's pretty clear.
THE COURT: Well, it says "a felony" in the indictment.
MR. SNEDDON: Yes, sir.
THE COURT: But the language is not felony language in the indictment.
MR. SNEDDON: Oh.
THE COURT: So it's not pretty clear.
MR. SNEDDON: Okay. I think the working assumption has been, from both sides, that it was a felony. But I understand what the Court's saying, and it occurs to me that perhaps they need to be instructed under both theories and --
MR. SANGER: Well, the indictment is a felony and the language of "by violence or menace" is the language of the felony. I mean, whether you say it's a felony or you say why it's a felony, he was indicted for --
THE COURT: A felony.
MR. SANGER: -- conspiracy to commit this felony. I don't think that --
THE COURT: You just think the language of the felony would be sufficient.
MR. SANGER: Yes, I think it would be probably required, but it would certainly be sufficient. 12575

THE COURT: Well, let's see. A misdemeanor is not a necessarily-included of the felony, so I guess we'll go with the felony instruction. That being the case, then that language is okay.
And then 9.70 is "Child abduction."
MR. SANGER: They've changed 9.70 to put in an introductory paragraph in the latest version, and I think that's probably a good addition.
THE COURT: All right.
9.72?
MR. SANGER: That appears to be a correct statement directly from CALJIC. And the bracketed material that was removed is appropriately removed.
THE COURT: That they took out "right to custody" and "abduct." "Abandonment," I mean.
MR. SANGER: That's correct.
THE COURT: And that's good. You agree with that?
MR. SANGER: Yes.
THE COURT: Okay.
And then 9.73? Okay. I'll give that.
MR. SANGER: That is according to CALJIC, 9.73. I withdraw any consent to it if we did, and I would object to it on the grounds that it's misleading. And it's misleading because it doesn't say it's not a defense if the other elements are met. 12576

THE COURT: Okay. I'll give that.
10.41, "Lewd act with a child under 14."
That looks like it's the same, doesn't it? You didn't change that, Mr. Franklin?
MR. FRANKLIN: No, Your Honor.
MR. SNEDDON: Just removed the brackets.
THE COURT: Okay. I'll give that.
10.60 -- did you take out 10.43 for some reason?
MR. SANGER: They withdrew .43 and .44.
THE COURT: So they're withdrawn.
MR. SNEDDON: May I have a second, Your Honor?
Right, those don't apply to the facts of our case. I'm sorry. Those don't apply to the facts of our case.
THE COURT: 10.43 and 10.44 are withdrawn.
10.60, "Sexual crimes - Corroboration not necessary," I'll give that.
10 --
MR. SANGER: Can I indicate that we withdraw -- I'm sorry to be just a step behind you, but it's hard to keep up. I'm trying to compare both of these.
On 10.60, we would withdraw our request and object to that.
THE COURT: 10.61, I don't have that. Did I have that? 12577

MR. SANGER: It was withdrawn by the prosecution in the latest set.
THE COURT: Okay.
MR. SANGER: And we would object to it.
THE COURT: So I won't give that.
MR. SNEDDON: Yeah, I don't think it applies.
THE COURT: 10.64, "Cautionary instruction - Child abuse/rape trauma syndrome," I'll give that.
MR. FRANKLIN: Your Honor, we don't remove the "rape trauma syndrome" language in the heading. The Court might want to consider doing that.
THE COURT: All right. Would you do that?
MR. SANGER: And we do object -- I'm just trying to keep track, Your Honor, I'm sorry, here. We would -- no, never mind. We'll submit it.
THE COURT: Okay. I'll give that. And it's in the heading, just what they're talking about.
MR. BEEBE: All right.
THE COURT: 10. -- or 14.70, "Extortion."
MR. SNEDDON: Judge, I think the Court needs to know ahead of time that the last paragraph of that instruction was added. It's language that was similar to an instruction given to the grand jury defining what a thing of value is, but that is not part of the standard instruction in 14.70.
MR. FRANKLIN: Your Honor, I believe that 12578

part of the grand jury record includes not only that instruction, but also the authority that we had mustered for that particular language. If that's not a part of it or not available to you, I can make that available to you promptly.
MR. SANGER: Well, we'd object to the addition of the paragraph. As I'm reading it here --
THE COURT: Well, let's do this: I'll give 14.70 on -- No. 2, "In order to prove this crime, the following elements must be proved: One, a person obtained property from the alleged victim. And two, the property" -- let's put "the thing of value" or "something of value." Let's put "something of value" there. The "something of value" -- well, let's see. "A person obtained something of value from the alleged victim." And then the second one, "The something of value was obtained with the consent of the alleged victim." And then the final sentence, No. 4, "Victim to consent to the giving up of his or her thing of value."
Then if you want to submit a special on that other issue, with authorities attached, we're going to take a break now, and I'll give you ten minutes to go do that. But I won't put it in as part of this instruction. Okay?
(Recess taken.) 12579

THE COURT: Okay. 16 point -- or 10.64, I think we agreed to give that one, right?
MR. SANGER: Okay.
THE COURT: I changed it. Yeah, I just changed it, and then there was going to be a possible addition.
MR. SANGER: I'm sorry, I'm completely lost. We're on 14.70, and you went back to 10-something.
THE COURT: No, I misspoke, and then I said 14.70.
MR. SANGER: I'm sorry, I didn't hear you.
THE COURT: I did go -- I mis...
All right. 14.71, I'll give that.
MR. SANGER: That's the new one?
THE COURT: Yes.
MR. SANGER: The one line. The one sentence.
THE COURT: Yes. I'm going by his new ones as best I can.
14.72, "Unlawful injury," I'll give that.
And now I have 14.73.
MR. SANGER: Submit it.
THE COURT: Which I didn't have before, I guess.
MR. SANGER: We did.
THE COURT: Did you?
MR. SANGER: But the new one looks appropriate. 12580

1 THE COURT: Is it okay?
2 MR. SANGER: Yes, sir.
3 THE COURT: All right. And then I have
4 14.74.
5 MR. SANGER: I can see there's a typo.
6 There's a number of brackets eliminated and so
7 forth. We need a minute to figure that out, if we
8 could, please.
9 THE COURT: Yeah. "...threatened ora third
10 person"?
11 MR. SANGER: "Ora."
12 THE COURT: "Ora."
13 MR. SANGER: And I guess the number "1"
14 should be removed, since --
15 THE COURT: Yeah. So take out the number "1"
16 and the -- put a space in, "...or a third person."
17 And then it appears to be all right. I'll give that
18 with those corrections.
19 16.135?
20 MR. SNEDDON: That's withdrawn.
21 THE COURT: Withdrawn.
22 17.02.
23 MR. SANGER: Yes.
24 THE COURT: That's withdrawn? Or that's the
25 new one. There was a 17.03.
26 MR. SANGER: Well, 17.02 was not requested
27 originally, but --
28 THE COURT: Right. 12581

MR. SANGER: -- but it is now.
MR. SNEDDON: It needs to be given.
MR. SANGER: It is now and it should be given, right.
THE COURT: Okay. And 17.03 should not be given, right?
MR. SNEDDON: Correct.
MR. SANGER: I believe that's true, yes.
THE COURT: So that's withdrawn.
MR. SANGER: 17.10, do we have a -- 17.10 was submitted originally and then it's been withdrawn.
THE COURT: Is that correct?
MR. SNEDDON: It should be given, though.
MR. SANGER: But I think it should be given, and it should be tailored to meet the particular lesser.
THE COURT: Okay. What we'll put on that, 17.10, is - and this has to be filled out - "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime."
MR. SANGER: It should say "a" lesser crime. But it's not a big deal. Oops.
THE COURT: "The crime of furnishing alcohol to a minor is lesser to that of administering an 12582

intoxicating agent to a minor charged in Counts 7 through 10."
And then down at the bottom, we'll reiterate the Counts 7 through 10.
The next one is --
MR. SANGER: And we agree to that, without waiving the objection to the lesser, but we agree that that's otherwise correct.
THE COURT: 17.12, that hasn't been filled in. Does that have to be given now?
Mr. Sneddon, does 17.12 have to be given now?
MR. SNEDDON: I think it does, Your Honor. And I do not believe, in the packet of the verdict forms, there was a lesser-included, so I'll have to do that.
THE COURT: Okay. Do you want to get somebody working on that?
MR. SNEDDON: Well, as soon as Mr. Franklin comes back from the other thing, I'll send him up to start on that one.
THE COURT: Okay. And then there's 17.24.1. 17.24.1 is the enhancement allegation, substantial sexual conduct.
MR. SANGER: That's under 1203.066 --
THE COURT: Yeah.
MR. SANGER: -- I take it.
THE COURT: I think that's the proper -- but 12583

there will be a finding included in the form for that.
Then 17.30, “Jury not to take a cue from the judge,” we’ll give that.
17.31, “All instructions not necessarily applicable,” we’ll give that.
17.32 --
MR. SANGER: That should not be given. I guess both sides thought Your Honor was going to be more vociferous.
THE COURT: Don’t you think this would be a good case for me to --
MR. SANGER: Maybe.
THE COURT: All right. I’ll reject that.
MR. SANGER: Your Honor, you realize we’re all speaking in code to the extent that nobody in the court knows what we’re talking about.
THE COURT: Oh, yes. The instruction 17.32 is an instruction that the judge may comment on the evidence, which in England is done regularly by judges, and in the United States is not done very often by judges. In fact, in my career I only had one judge do that, and he was reversed for doing it. So it’s not something I would have ever done or intend to do this time.
MR. SANGER: I did remark, Your Honor, that if we had televised today’s proceedings, we could have deterred an entire generation of kids from 12584

going to law school.
THE COURT: Okay. And 17.31, “All
instructions” -- oh, 17. -- 17.31, “All instructions
not necessarily applicable.”
MR. SANGER: That was already in there.
THE COURT: Okay. And then 17.40.
MR. SANGER: 17.40.
Oh, wait, 17.32 we did do, which is --
MR. SANGER: That’s the one you’re not
giving.
THE COURT: When the judge does not comment
on the evidence. And then --
MR. SANGER: I’m sorry, Your Honor, maybe
I’m losing it, here.
THE COURT: They didn’t put it in their
new --
MR. SNEDDON: Which one, Judge?
MR. SANGER: .30 you gave. .31 you gave.
.32 you’re not giving, I believe.
THE COURT: No. .31 I’m giving.
MR. SANGER: Yes.
THE COURT: 17.32 is -- I have not --
MR. SANGER: This is the one you’re not
giving.
THE COURT: All right. You’re right.
17.40. There is one that I did that says I
am not --
MR. SANGER: That’s .30. 12585

THE COURT: That's .30. Okay.
17.40 --
MR. SANGER: I think that's correct.
THE COURT: -- I'm giving. 17.41 I'm giving.
17.42 I'm giving. 17.43 I'm giving.
MR. SNEDDON: Judge, we didn't know -- on
the second paragraph there, on 17.45, we didn't know
exactly what format the Court was going to be giving
these in, but that may be that that should be
deleted, because it looks like the Court's going to
be giving clean copies to all the jurors.
MR. SANGER: Well, actually, the whole thing
should be changed, given the Court's proposed course
of action.
THE COURT: Yeah.
MR. SANGER: I think we should say the
jurors will each be given their own copy of the jury
instructions which they may mark on if they wish.
There will be one official copy of the jury
instructions which shall not be defaced in any way.
That's what you have to tell them, I think.
THE COURT: Yeah, I think you're right. This
we should give at the beginning of the instructions,
though, instead of the end.
MR. SANGER: Yes, that's a good idea.
THE COURT: Let's come back. We'll modify
that a little bit.
And 17.47, "Admonition against disclosure of 12586

jury balloting."
Are they going to receive a separate verdict form on each of the crimes? I guess. So I'll give 17.49.
And 17.50 I'll give, "Concluding instruction on selecting a jury foreperson."
MR. SANGER: 17.49, I didn't see -- where's .49? Let me just see, here.
I'm sorry to go backwards, Your Honor, but on 17.49, the one currently submitted by the prosecution does not take into account the lesser-included, and I think that language has to be put back in there.
THE COURT: I think it's all right, though, as long as the return of the -- the one we still have to have, the partial verdict form instruction, is complete.
MR. SANGER: Maybe it's because it's the end of the day, but does that cover --
MR. SNEDDON: I think this needs to be given, because what will happen is if, on the lesser part, if you don't give it, they may sign it thinking that if they've convicted on the larger, they're supposed to sign on the smaller also, and it's a matter of clarification for them in terms of what their role is in terms of the lesser and the larger.
THE COURT: Do you mean -- you're talking 12587

about 17 --
MR. SNEDDON: .49. I thought that's what
Mr. Sanger was talking about.
MR. SANGER: Yeah, 17.49.
THE COURT: He just wondered if there should
be a statement of the lesser-included in that
paragraph. It says, "You've been charged with one
count of conspiracy, four counts of lewd act upon a
child, one count of attempted lewd act and four
counts of administering an intoxicating agent."
MR. SNEDDON: Well, I understood that he was
also suggesting that the second larger paragraph be
reinserted, because it was not in there.
THE COURT: Oh. I don't have that.
MR. SNEDDON: No, sir. That's because we
didn't envision lessers at the point in time.
THE COURT: So you think it should go in now?
MR. SNEDDON: I do, Your Honor. I think
that's what counsel was talking about, and I do
agree with him. The language is, "Since a lesser
offense is included in the greater, you are
instructed that if you find the defendant guilty of
the greater offense, you should not complete the
verdicts on the corresponding lesser offense."
THE COURT: Okay.
MR. SNEDDON: "And those should be returned
to the Court unsigned." I think that's important.
Otherwise, they may misconstrue the way the verdicts 12588

operate.
And I'm not suggesting the last paragraph be left out. I'm just trying to direct them where --
MR. SANGER: The last paragraph would be more beneficial to the defendant, so there's one for each side there, and both should be in.
MR. SNEDDON: I agree. I just wasn't going to read the whole thing.
THE COURT: So now you want us to put in the entire instruction as it appears in the book?
MR. SANGER: I think if we have a lesser, I think you should do that. That's what he's saying.
THE COURT: "Separation admonition."
"The admonition to alternate jurors" I'll give, 17.53.
MR. SANGER: You're way ahead. You said 17.50?
THE COURT: Yes.
MR. SANGER: That's where I was, 17.50. Did you go beyond that, Your Honor?
THE COURT: Yes. 17.52.
MR. SANGER: Okay.
THE COURT: And 17.53. And then there's this post-verdict admonition, which I won't give to them in their package now.
MR. SANGER: Right.
MR. SNEDDON: Judge, this is sort of a new CALJIC, CALJIC 17.54. I didn't request it. I just 12589

happened to notice it, but the basics of it is that people not take cell phones into the jury deliberation room.
THE COURT: They're not allowed to bring in cell phones now.
MR. SNEDDON: Okay. This is a new instruction. I mean, I just didn't know whether -- it looks like the problem's taken care of. We don't need to give it.
THE COURT: What number is it?
MR. SNEDDON: 17.54. And they cite a case, but --
MR. SANGER: It replaced the old one that had to do with bringing Ouija boards in. I don't think it's mandatory. In fact, it says if you're going to do it, you should do it as part of the preinstruction back in the beginning of the case under 0.50. But if the court staff and the bailiffs are not allowing the jurors to have cell phones to start with I think saves the problem. Whatever the Court wants to do.
THE COURT: That's the case, isn't it, Leslie?
THE BAILIFF: It is. They do not have cell phones.
THE COURT: I should give 17.47, too. Did I give that? Yeah, I did. Okay.
CALJIC 16.0.10 -- .010? 12590

MR. SNEDDON: We withdrew that.
THE COURT: Well, but where we were -- where are we going to put it in the --
MR. SNEDDON: Oh, is that the B&P one?
THE COURT: I read it earlier.
MR. SNEDDON: Is that the B&P one, Your Honor?
MR. SANGER: Yes.
MR. SNEDDON: Oh, I'm sorry. I was thinking of another one.
THE COURT: I read to you what I would do, and then we needed the -- that should go, what, right next to the other charges? What number are they?
MR. SNEDDON: Well, you could put it right after your instruction on the lesser-included offense.
MR. SANGER: Do you mention --
THE COURT: Well, we had -- there's 222, which is a special also.
MR. SANGER: Yeah, I'm not seeing 222. That's the problem.
THE COURT: That's where it goes. Did you see it? Did you not get it?
MR. SANGER: I can't say I didn't. I cannot say I did not get it, but I do not have it.
THE COURT: It was in your original package, but it's not in your new package, Mr. Sneddon. 12591

MR. SNEDDON: I'm sorry, Your Honor, what section is that?
THE COURT: 222, which is the Penal Code Section 222 special, "...administers to another any intoxicating agent with intent to...," and that's the one that this lesser should be with.
I'm going to put it right after -- both of those right after the extortion, but I don't understand. Your instruction has "Elements," and then nothing after that. Have you seen it?
Do you both want to approach?
MR. SANGER: Yes.
(Discussion held off the record at sidebar.)
THE COURT: Tracy?
And then the furnishing, that goes behind it.
MR. SANGER: In between those two, would you not put 17.10?
THE COURT: Put what?
MR. SANGER: 17.10, in between the --
THE COURT: Do you mean 17.12?
MR. SANGER: No, 17.10.
THE COURT: Lesser-included. Okay.
MR. SANGER: Now, did that 222 start out with, "In the crimes charged in Counts 7 to 10"?
THE COURT: No, it says, "Any person who administers to another any" --
MR. SANGER: I think it should start out -- 12592

because that was the typical introductory paragraph. Just a paragraph that says, “In the crimes charged….” How does it start out in the other ones? Not the conspiracy ones, but the others?
THE COURT: No, it doesn’t.
MR. SANGER: Well, for instance, 10.41, “The defendant’s accused in Counts so and so” --
THE COURT: 9.70 just says, “Defendant is accused in Count 1 of….” Is that what you’re talking about?
MR. SANGER: Yeah. So we need to say, “The defendant is accused in Counts 7 through 10 of” --
THE COURT: Okay.
MR. SANGER: -- whatever it’s called.
THE COURT: Did you get that? Look at the extortion one, or the child abduction one, and you’ll get the opening sentence to it.
MR. SANGER: Not quite, because that says “conspiracy to commit,” I think.
THE COURT: Okay.
MR. SANGER: So it should just be “the crime of.” I was looking at 10.41 as being a good example. “The defendant’s accused in Counts 2, 3, 4 and 5.” Here it should be, “The defendant’s accused in Counts 7, 8, 9 and 10.”
THE COURT: Now, I think what we have left are the specials; is that right? 12593

MR. SANGER: Yes, sir. And then also --
those also may or may not have an impact on a few of
the instructions we tabbed.
THE COURT: Okay.
MR. SANGER: We have Special No. 1.
MR. SNEDDON: Which ones?
MR. SANGER: Those are your original
instructions, and I think the Court considered that
way back when, when the thing was played.
THE COURT: And we did a -- do you have the
transcript, Tracy or Jed, of the instruction I
actually gave when it was played?
MR. BEEBE: Yes.
THE COURT: I had it this morning. Because
we took part of yours and part of the district
attorney's at that time.
MR. SANGER: When the Court's ready, I would
like to be heard briefly on this theory that I think
Your Honor was rejecting, but we --
THE COURT: Wait till we get to it. We
haven't done it. I was just indicating my feelings.
MR. SANGER: Okay.
THE COURT: Okay. On Special Jury
Instruction No. 1, I'm willing to give that
instruction, without the middle paragraph, in this
form: "The video of 'Living with Michael Jackson'
is not offered for the truth of anything said or
shown in the program, with the exception of certain 12594

identified passages. You will receive additional instructions with regard to those identified passages. The rest of the contents of the video is hearsay and cannot be considered by you to prove anything other than the fact that the program aired in February of 2003 and its likely impact on Mr. Jackson's state of mind."

And then skip the middle paragraph, and then, "You should not be biased, prejudiced or influenced in any way by the content of the video or by its commercial packaging. Except for the limited specific statements that the Court will instruct you" -- "Except for the limited specific statements that the Court will instruct you may be considered, the remainder of the program should only be considered for the fact that it aired and its impact on Mr. Jackson."

MR. SANGER: Can we say "its impact, if any," on Mr. Jackson?

THE COURT: Yes.

MR. SNEDDON: Judge, may I make a comment?

THE COURT: Yes.

MR. SNEDDON: I thought the additional circumstantial basis for the admission of it was to show the motive for the crime, of the conspiracy. And that goes a little bit beyond merely Mr. Jackson's -- any impact, if any, on Mr. Jackson's state of mind. It goes to the actual motive for 12595

forming or need to form the conspiracy. So maybe something like "any relevance it may provide, if any, on the motive for the conspiracy," or something like that.
MR. SANGER: Well, one way to accommodate it, just to try to accommodate it at the end of the day here, you could say, "its impact, if any, on Mr. Jackson or on other individuals mentioned in the course of the trial."
But then if you say that, then we should say, "It is up to you to determine what significance, if any, to place on this evidence."
THE COURT: Isn't there somewhere else in the instructions that we discussed the motive as --
MR. SNEDDON: Yeah, there's a general instruction on motive, which is, I think, 2.51, but you're actually -- in this one, you're being very specific about this piece of evidence and what the limited purpose of it is.
THE COURT: When I say "its likely impact on Mr. Jackson's state of mind," aren't we saying that then you can argue that the impact is motive? I mean, should I have "motive" in the instruction if I'm saying that it was introduced to show the impact on him?
MR. SNEDDON: I just didn't want to get in the position, Your Honor, of having someone stand up and make an argument and start talking about motive 12596

in this connection and then saying, you know, it's really for his state of mind in terms of whether he was angry or upset about the production.
THE COURT: No, I think that's one of the states of mind. That's what we're talking about is in his state of mind of whether or not that was a motive to do certain things that you allege he did based on that video.
MR. SNEDDON: Well, I'm comfortable with what the Court's saying as long as everybody understands that. I just didn't want to have to argue an objection on that, because I think that was one of the underlying reasons.
THE COURT: Okay.
MR. SANGER: All right. I under -- I think that -- I think that's sufficient and it can be argued.
THE COURT: Okay.
MR. SANGER: Do you want to have our office retype this?
THE COURT: No, I think we'll do it.
(To Mr. Beebe) Do you have a problem?
MR. BEEBE: We're not clear what the language is now.
THE COURT: It's exactly what's here except where I wrote in "if any" in red.
MS. SPLITGERBER: Okay.
MR. SNEDDON: Judge, when you say "exactly 12597

what's here," that's different from the defense instruction, correct?
THE COURT: Right. It's what I just read.
MR. SNEDDON: Yeah. Thank you.
THE COURT: Now, the second instruction was --
MR. SANGER: It might be helpful to look at proposed Instruction No. 5 because I think that -- Special Instruction No. 5 would follow this instruction.
THE COURT: Well, okay. I'm just going to reject Special Instruction No. 2. So I'm giving No. 1. as modified. Reject 2. Refuse 2. And then we go to the ones you filed this morning. No. 3, I'll give No. 3.
MR. SNEDDON: Your Honor, may I be heard on that?
THE COURT: Yes.
MR. SNEDDON: Judge, I think that's a misstatement of the law. And I'll tell you -- first of all, I object to the use of the word "government." Second of all -- I mean, I don't see one CALJIC instruction that uses the word "government" anywhere in it.
But second of all, I don't believe that it's the law that the jury necessarily has to agree to the particular set of facts that make up the charges. For instance, let me just give you an 12598

example. If all the jurors agree that Mr. Jackson placed his hands inside of the child's pants, it's not necessary for the jury to agree that he had underpants on at that time or he had pajamas on at that time, or he had a shirt on at that time or he didn't have a shirt on at that time, or that Mr. Jackson had his socks on at that time or he didn't have his socks on at that time.

And I think that's what's misleading about this, and that's what happens when you stray from the standard instructions, and this is a very misleading instruction.

MR. SANGER: Well, nothing happens if you stray from the standard instructions if they don't cover the law. If they don't cover the law it's reversible, so we have to do something in light of Blakely and Aprendi and the cases after it that there has to be unanimity, particularly when the charges are alleged in such a broad fashion. So the prosecution has to, in essence, opt for a set of facts.

I would agree with Mr. Sneddon, of course, it doesn't, you know, matter -- the details don't matter as to whether or not the jury agrees on the set of facts that make up the elements. But you can't have one -- you know, six jurors agreeing to one occurrence, and another six jurors agreeing to another occurrence, and particularly in a case like 12599

this where you've had a lot of descriptions. You haven't had consistent descriptions for these various offenses. You can't have, say, one set of jurors saying, "Well, let's see, I believe that Star's story was correct and I don't believe Gavin's," and the other saying the other way around. Either it's -- so we have to accommodate that somehow.

MR. SNEDDON: Well, I think the standard instruction does that. It tells them they have to deliberate on each -- each count separately and arrive at a decision on each count separately.

MR. SANGER: It says, "...particular set of facts as alleged in a particular count," so, I mean, that is saying it's the facts alleged in the count.

THE COURT: Let me -- no one say anything. We're off the record.

MR. SNEDDON: Oh, okay.

(Discussion held off the record at sidebar between the Court and the court reporter.)

THE COURT: Where's a -- Commander? If I take a ten-minute break and go for another half hour after that, what's it going to do to you?

COMMANDER MEYER: No problem.

THE COURT: We can do it? Okay. I just want to take ten minutes. And this is a pretty serious part where we are, the last six instructions. I don't want to rush them, and 12600

the court reporter's consented to work. She's the one that's the most affected by this, next to security. So let's take ten, and a short break, and then we'll come back and deal with the -- and maybe you'll have your things by then.
MR. SNEDDON: I've got the verdicts already. I'll give them to you.
THE COURT: And the changed instructions?
MR. SNEDDON: Jerry's working on it.
(Recess taken.)
THE COURT: What I'm feeling is I can't really finish the instructions the way I want to do it, and I don't like working under the pressure of worrying about other people here and myself. I'm not satisfied with any of the specials proffered by the defense. But I feel that we have not -- none of us have put together a good jury instruction on the tapes, all of the tapes.
We have four tapes that they have watched, and there's some very limited uses that each of those tapes can be used for, and there's no instruction here that adequately guards against misuse. So I'm not -- I'm not going to proceed. I'm not going to go all this distance and then try to rush, in half an hour, to get something done that needs to be done.
MR. SANGER: Can I add something to the Court's concern? 12601

THE COURT: Yeah.
MR. SANGER: And I hate to be the bearer of these tidings. We were looking at the lesser-included, which we objected to. And since we objected, I suppose I could just leave it on the record like that, but as I was talking to Mr. Dunkle, he had the added observation that actually 222 doesn't have the same elements, because 222 doesn't require a minor.
And remembering case law on lessers, where it has to be exactly the same elements, minus one or two, it's -- that's an issue. And then furnishing is not the same as administering.
So I want to give the Court a fair opportunity on that. I didn't want to not mention it, but if we are going to have to change that, that's something that's going to be more than a two-minute change to go back.
THE COURT: Yeah. Well, and I haven't also got to review the materials that you typed in a hurry and brought down, and the verdict forms, and since I'm putting packages together for the whole jury, I don't want to be doing it at the last minute.
I think what I should do is continue the jury instruction conference until tomorrow morning at our regular time. Then the question becomes, when do I have the jury come back in? And I could 12602

have them come in at noon, at our normal noon recess. That would give me an hour. If I instructed from, you know, around 10:00 to 12:00 till -- reading these instructions is probably going to take over an hour. So that would put me at one o'clock or so.

And then that would start Mr. Sneddon with his argument. Or I could have you come back in and do your argument on Thursday morning. But it seems to me even bringing the jury in just to instruct them is worth it, considering trying to get the case out by Friday, late Friday, that it would be a wise thing for me to at least instruct tomorrow.

MR. SANGER: That seems like a good idea, and it does seem that there's probably nothing wrong with the jury just getting the instructions on the law one day. It has --

THE COURT: It's not a very good use of time, but considering that we want to do this right and not be rushed into decisions that are not good ones, I think that's what we'll do.

MR. SNEDDON: Judge, my preference would be to have us not start argument after you give the jury instructions tomorrow, and I guess part of that still has to do with what -- whether there is or is not any time limitations that might drive that decision, too, which we have not decided, and which we really need to come to grips on, but I don't 12603

think we need to keep all the staff here to do that.
THE COURT: No.
Well, we can -- I think what we'll do is recess and let everyone go. I'll have one attorney from each side come back and we'll discuss time limitations on your argument, and then I'll work on the rest of these instructions. And we'll start at 8:30 tomorrow morning.
MR. SANGER: Just before you break, on the issue of the -- what comes in for the truth of the matter on the tapes --
THE COURT: Yes.
MR. SANGER: -- could I just be heard on that very briefly? And I know it's keeping staff. I'm sorry.
But we did try to go through and outline what would be relevant. The problem with doing that is that even if we were to agree - or it doesn't matter if we don't agree, the Court decides - then the Court has to sit there and read that to the jury, which then has the effect of unduly emphasizing both sides. I mean, it's -- you know, you're reading specific statements of Mr. Jackson either from the Bashir tape or from the outtakes. And that's why -- it was not out of laziness. It was after reflecting on it, that if you can do it generically, what ultimately in this case would be the harm? I mean, there's very 12604

limited statements in the Bashir tape that pertain to Mr. Jackson's relationship with children, which is what the prosecution wants to bring in, and it has to be statements of Mr. Jackson and relating to children, and there are pretty much identifying statements in the outtakes.

I don't think there's a big danger in doing it that way, and what it really avoids is the Court, you know, having to read from both tapes and unduly emphasizing the text. So I just wanted the Court to understand that was our theory behind it.

Now, if the Court wanted to have the parts that we believe should be read by the Court from the outtakes, we could --

THE COURT: I never asked to have the material given to me so that I could read it to anybody.

MR. SANGER: Okay.

THE COURT: It never was my intent. It was so that I could see what the District Attorney was going to argue were admissions so that I would have a sense of what I could allow you to put in, to show the complete context of those statements, which is what you're -- I think you're allowed to do, but I never thought you were lazy either. I thought you were -- you thought it over and you thought, "Well, it would be good if everything he ever said about children could be taken for the truth of the matter 12605

asserted," and I just didn't think that was a good way to approach it.
MR. SNEDDON: Judge -- well, I do need to make a statement about that. The reason I think it's very important for us to have some agreement and consensus on what statements do constitute the admissions part is that so, during the course of the arguments, if the defense attempts to use something for the truth of the matter, there is some guidelines as to what it is the Court recognizes is hearsay and not hearsay.
So there's another reason for us -- for you to decide that, not to read to the jury, but that both sides know what the boundaries are, so --
THE COURT: I agree.
MR. SNEDDON: Okay. Thank you.
THE COURT: There's a preliminary determination that is not binding on the jury, because ultimately whether something is an admission or not is up to them.
MR. SNEDDON: Correct.
THE COURT: But the Court has the duty of making a preliminary look at the material and not allow them to be considering admissions that aren't admissions.
So then we'll see -- well, first of all, two of you come back on the time issue, and other than that, we're through for the day. 12606

THE BAILIFF: 12:00 for the jury.
THE COURT: That's what time they're in the courtroom, not when they're supposed to get there. So having them here at 11:30 might be the right time to have them.
(The proceedings adjourned at 2:55 p.m.)
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REPORTER'S CERTIFICATE

THE PEOPLE OF THE STATE OF)
CALIFORNIA,)
Plaintiff,)
-vs-) No. 1133603
MICHAEL JOE JACKSON,)
Defendant.)

I, MICHELE MATTSON McNEIL, RPR, CRR, CSR #3304, Official Court Reporter, do hereby certify: That the foregoing pages 12506 through 12607 contain a true and correct transcript of the proceedings had in the within and above-entitled matter as by me taken down in shorthand writing at said proceedings on May 31, 2005, and thereafter reduced to typewriting by computer-aided transcription under my direction.

DATED: Santa Maria, California, May 31, 2005.

MICHELE MATTSON McNEIL, RPR, CRR, CSR #3304
OFFICIAL COURT REPORTER